

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<b>CONGREGATION KOL AMI and</b>	:	
<b>RABBI ELLIOT HOLIN</b>	:	<b>CIVIL ACTION</b>
	:	<b>No. 01-1919</b>
<b>v.</b>	:	
	:	
<b>ABINGTON TOWNSHIP; BOARD OF</b>	:	
<b>COMMISSIONERS OF ABINGTON</b>	:	
<b>TOWNSHIP; THE ZONING HEARING</b>	:	
<b>BOARD OF ABINGTON TOWNSHIP and</b>	:	
<b>LAWRENCE T. MATTEO, JR., in his official</b>	:	
<b>capacity as Director of Code Enforcement of</b>	:	
<b>Abington Township</b>	:	

**PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO  
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

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## INTRODUCTION

Defendants' present motion for summary judgment – like their nearly identical motion to dismiss or for summary judgment of June 2001 – is an exercise in exaggeration, distortion, and glaring omission.

Defendants repeatedly claim that Plaintiffs lack sufficient evidence to meet their burden of production, but notably omit that discovery is barely under way in this case. Many of Plaintiffs' discovery requests propounded soon before this Court's grant of summary judgment – including document requests, interrogatories and deposition notices – remain wholly unanswered or incompletely answered, and the Third Circuit's opinion contemplates further discovery regarding “similarly situated” uses. For that reason alone, this entire motion should be denied summarily under Fed. R. Civ. P. Rule 56(f). *See* Rule 56(f) Declaration of Jonathan Auerbach, Esquire (March 14, 2003) (hereinafter “Auerbach Decl.”) attached hereto as Exhibit A.

Similarly, Defendants take liberties with the recent decision of the Third Circuit. Defendants claim that the Court of Appeals conclusively determined that “invidious discrimination plays no role in this case.” Defs. Mem. 49. In fact, the Court of Appeals only noted the absence of “evidence of anti-Jewish or anti-religious animus in the record,” 309 F.3d at 143, but the IR summary judgment record was assembled before the Defendants produced *even a single written discovery response or deponent*. But evidence that was not briefed, argued, or otherwise called to the attention of the Court of Appeals – as well as evidence revealed in the short period of discovery before summary judgment was granted – suggests at least some form of discriminatory or otherwise irrational animus on the part of the Township. In any event, “anti-Jewish or anti-religious animus” are not even the precise forms of religion-based animus that the Congregation has claimed are operative in this case – though discovery may change that.

Defendants claim that the Third Circuit has required this Court to apply only the rational basis standard in this case. *See* Defs. Mem. 44. Instead, the Court of Appeals ruled only on the as-applied, rational-basis part of the Congregation’s Equal Protection claim, because that was the only part of this case decided in this Court on summary judgment, and so the only part necessarily on appeal before the Third Circuit. The Court of Appeals did *not* address whether the Ordinance or its application here could *also* be subjected to strict scrutiny. Specifically, the Court did *not* make any findings regarding whether this particular law or its application employed a suspect classification or trammelled a fundamental right under the Equal Protection or Due Process Clauses; was neutral and generally applicable under the Free Exercise Clause; or imposed a “substantial burden” pursuant to a system of “individualized assessments” under both the Free Exercise Clause and RLUIPA Section 2(a).<sup>1</sup> All of those claims remain alive and well.

Defendants also claim that – based on the Third Circuit’s opinion alone and prior to their responses to outstanding discovery requests – they are entitled to judgment as a matter of law on all

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<sup>1</sup>Indeed, the Court of Appeals did not make any “findings” at all, but instead reviewed this Court’s summary judgment determination *de novo*, according to the ordinary summary judgment standard. *See Kol Ami*, 309 F.3d at 130; *see also Summers v. Dept. of Justice*, 140 F.3d 1077, 1079-80 (D.C. Cir. 1998) (noting that findings of fact are typically absent in summary judgment decisions, because findings imply the resolution of disputes of material fact). Among other things, that standard required the Court of Appeals to draw all inferences in favor of the Township, because they were the non-movants on that motion. *Curley v Klem*, 298 F.3d 271, 276-77 (3d Cir. 2002) (“In evaluating the evidence, we are required to view the inferences to be drawn from the underlying facts in the light most favorable to the party opposing the motion.”) (quoting *Bartnicki v. Vopper*, 200 F.3d 109, 114 (3d Cir. 1999)). The opposite is true now that the Township is moving for summary judgment: the Congregation is entitled to all reasonable inferences. Accordingly, the statement of facts from the Court of Appeals should not be read either to have resolved any factual disputes – of which there are many – nor to have drawn inferences that are binding on this motion (or indeed on this remand as a whole). Treating the Court of Appeals’ recitation of some undisputed facts – along with inferences resolved in favor of the Township – as the last word on the facts is especially inappropriate because discovery is not only incomplete, it is barely under way.

of the Congregation’s rational-basis claims. *See id.* at 10, 51 (equal protection); *id.* at 66 (due process). But the Court of Appeals remanded specifically “so that the District Court can consider the similarity issue in the first instance,” and specifically because that determination could not be made based on the language of the Ordinance alone. 309 F.3d at 142. Along the same lines, the Court of Appeals emphasized that the Congregation’s rational-basis challenge to the Township’s ban on houses of worship in every residential zone – the primary basis for the Congregation’s original summary judgment motion – “need[s] to be considered on remand as well.” *Id.* at 144. Moreover, now that the Township has acknowledged that allowing this synagogue in this place, subject to certain reasonable limitations, “will not adversely affect the health, safety and welfare of the community,” it is especially bizarre that the Township seeks summary judgment on the claim that prohibiting that use *altogether* is rationally related to protecting health, safety, and welfare. Opinion and Order of the Board, App. 99-36, Conclusion of Law ¶ 10, at 14 (Aug. 15, 2001) (hereinafter “8/15/01 Bd. Op.”).

Even after we highlighted the omission in our opposition to the Township’s June 2001 motion, *see* Pltfs. 7/5/01 Opp. Mem. 1, the Township *still refuses to cite* controlling Third Circuit precedent in its argument for summary disposition of the Congregation’s Free Exercise and Free Speech claims. *See* Defs. Mem. 11-14 (moving to dismiss Plaintiffs’ federal Free Exercise claim without citing applicable standard in *Fraternal Order of Police v. City of Newark*, 170 F.3d 359 (3d Cir. 1999)); *id.* at 42-44 (moving to dismiss federal Free Speech and Free Assembly claims without citing *any* Third Circuit authority, including applicable time, place and manner standard in *Phillips v. Borough of Keyport*, 107 F.3d 164 (3d Cir. 1997)).

Defendants proceed vastly to overstate the certainly broad authority of local governments to regulate land-use, as if they were virtually unconstrained by traditional federal constitutional protections against arbitrariness, discrimination, and burdens on the free exercise of religion, expression and association. *See, e.g.*, Defs. Mem. 26-28 (dedicating entire section to general proposition that land-use law is a “Traditional Arena of Local Control”). Precisely because these federal parameters have long applied to local land-use laws – and because the new Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §2000cc, *et seq.* (“RLUIPA”), merely restates and codifies them to facilitate enforcement – the sky will not fall if the Congregation prevails here.

And when it comes to assessing the constitutionality of RLUIPA, Defendants play even faster and looser. They avoid any reference whatsoever to the recent decision of this Court in ***Freedom Baptist Church v. Middletown Tp.***, 204 F. Supp. 2d 857 (E.D. Pa. 2002), which has already rejected the very same constitutional challenges to RLUIPA raised here (and then some). That decision, moreover, stands squarely within what has become a long line of federal decisions – including a recent decision of the Ninth Circuit – that have rejected similar challenges over and over again.<sup>2</sup>

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<sup>2</sup> *See, e.g., Mayweathers v. Newland*, 314 F.3d 1062 (9<sup>th</sup> Cir 2002) (rejecting Spending Clause, Establishment Clause, Tenth Amendment, Eleventh Amendment, and Separation-of-Powers challenges); ***Johnson v. Martin***, 223 F. Supp. 2d 820 (W.D. Mich. 2002) (rejecting Commerce, Spending, Establishment Clause, and Tenth Amendment challenges); ***Gerhardt v. Lazaroff***, 221 F. Supp. 2d 827 (S.D. Ohio 2002) (rejecting Spending Clause, Establishment Clause, and Tenth Amendment challenges); ***Charles v. Verhagen***, 220 F. Supp. 2d 955 (W.D. Wis. 2002) (same); ***Freedom Baptist Church v. Tp. of Middletown***, 204 F. Supp. 2d 857 (E.D. Pa. 2002) (rejecting Enforcement, Commerce, and Establishment Clause challenges); ***Christ Universal Mission Church v. City of Chicago***, No. 01-C-1429, 2002 U.S. Dist. LEXIS 22917, at \*24 (N.D. Ill. Sept. 11, 2002) (rejecting constitutionality challenge, adopting reasoning of ***Freedom Baptist Church***). *See also Hale O Kaula v. Maui Planning Comm’n*, 223 F. Supp. 2d 1056, 1072 (D. Haw. 2002) (declining to address constitutionality of RLUIPA in detail, but concluding that “jurisdictional element” of § 2(a)(2)(B) precludes Commerce Clause challenge, and that § 2(a)(2)(C) “codifies the ‘individualized assessments’ doctrine”); ***Cottonwood Christian Center v. City of Cypress***, 218 F. (continued...)

Rather than cite and attempt to distinguish even one of these federal decisions, the Township prefers instead to ignore them.

The Township compounds these omissions with more distortions. Not only do Defendants misstate the Enforcement Clause standard, *see* Defs. Mem. 29 (claiming that “history and pattern” of constitutional violations must also be “widespread and persisting”), but they describe the volumes of evidence that Congress amassed precisely to satisfy that standard as merely “a short string of land-use anecdotes.” Defs. Mem. 30. And notwithstanding their occasional concern for separation of powers, *see, e.g.*, Defs. Mem. 24, Defendants disregard the well-established principle that federal courts should afford Acts of Congress considerable deference—especially those passed unanimously and based on a mountain of evidence demonstrating the need for legislation – and instead urge this Court to strike down RLUIPA on its face. *See* Defs. Mem. 22.

In opposing this motion, the Congregation will take a different approach. First, the Congregation will describe the applicable standard for deciding motions for summary judgment, including the standard for assessing when such motions are premature. Second, the Congregation will provide its account of the facts, supported by the evidence currently available, notwithstanding the early stage of discovery in the case and the incomplete responses from Defendants.<sup>3</sup> Third, the Congregation will set forth the elements of each of its claims and – to the extent evidence is currently

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2(...continued)

Supp. 2d 1203, 1221 n.7 (C.D. Ca. 2002) (noting that “RLUIPA would appear to have avoided the flaws of its predecessor RFRA, and be within Congress’s constitutional authority,” citing *Freedom Baptist Church*).

<sup>3</sup> The Congregation will also occasionally cite to its Complaint, either to make clear the inferences to which the Congregation is entitled based on available evidence, or to identify inferences for which the evidence remains, as yet, unavailable.

available – will demonstrate the existence of a genuine issue of material fact as to each element. Fourth, the Congregation will demonstrate how RLUIPA is constitutional. Finally, the Congregation will explain why Defendant Matteo should not be dismissed from this action.

Accordingly, the Congregation urges this Court to deny or continue the Township’s motion for summary judgment pursuant to Rule 56(f) of the Federal Rules of Civil Procedure, in order to provide the Congregation a full and fair opportunity to develop their claims through pending and additional discovery. *See* Auerbach Decl., Exhibit A, hereto. In the alternative, the Court should find that genuine issues of material fact preclude summary judgment in favor of the Township.

#### **APPLICABLE LEGAL STANDARD**

Summary judgment is proper where “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” *Radich v. Goode*, 886 F.2d 1391, 1393-94, 1395 13 (3d Cir. 1989) (quoting Fed. R. Civ. P. 56(c)). The moving party has the initial burden of showing that no genuine issue of material fact exists. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Upon that showing, the nonmoving party “must make a showing sufficient to establish the existence of every element essential to his case, based on the affidavits or by the depositions and admissions on file.” *Pastore v. Bell Telephone Co. of Penn.*, 24 F.3d 508, 511 (3d Cir. 1994). But “[i]n evaluating the evidence, [the Court is] required to view the inferences to be drawn from the underlying facts in the light most favorable to the party opposing the motion.” *Curley v. Klem*, 298 F.3d 271, 276-77 (3d Cir. 2002) (quoting *Bartnicki v. Vopper*, 200 F.3d 109, 114 (3d Cir. 1999)).

Because it would be all too easy for a party seeking summary judgment to claim that evidence is lacking when discovery is incomplete, the Federal Rules of Civil Procedure provide a “safeguard against an improvident or premature grant of summary judgment” in the form of Rule 56(f). 10A WRIGHT, MILLER, & KANE, FEDERAL PRACTICES AND PROCEDURE § 2740 (1983); *see, e.g., Mannington Mills, Inc. v. Congoleum Industries, Inc.*, 610 F.2d 1059, 1073 (3d Cir. 1979) (“district judge acted prematurely by ruling on the summary judgment motion before [plaintiff] had had fair opportunity to depose the officers and employees of [defendant] regarding the existence of an agreement between [defendant] and its licensees.”). *See also Anderson v. Liberty Lobby*, 477 U.S. 242, 250 n.5 (1986). That rule provides:

Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party’s opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

The rule “explicitly provides that the party must file an affidavit setting forth why the time is needed.” *Pastore*, 24 F.3d at 510-11.

“[W]hether a Rule 56(f) motion should be granted “depends, in part, on ‘what particular information is sought; how, if uncovered, it would preclude summary judgment; and why it has not been previously obtained.’” *San Filippo v. Bongiovanni*, 30 F.3d 424, 432 (3d Cir. 1994) (quoting *Contractors Ass’n v. City of Philadelphia*, 945 F.2d 1260, 1266 (3d Cir. 1991) (quoting *Lunderstadt v. Colafella*, 885 F.2d 66, 71 (3d Cir. 1989))), *cert denied*. 513 U.S. 1082 (1995). Specifically, “[b]eyond the procedural requirement of filing an affidavit, Rule 56(f) also requires that a party indicate to the district court its need for discovery, what material facts it hopes to uncover

and why it has not previously discovered the information.” *Radich v. Goode*, 886 F.2d 1391, 1393-94 (3d Cir. 1989) (citing *Hancock Industries v. Schaeffer*, 811 F.2d 225 (3d Cir. 1987)).

### **STATEMENT OF DISPUTED AND UNDISPUTED FACTS**

#### **A. The Abington Zoning Ordinance**

Abington Township’s current zoning ordinance prohibits houses of worship in all residential districts (R-1, R-2, R-3, and R-4), not even allowing them by special exception. Complaint ¶¶ 38-39; Abington Township Revised Zoning Ordinance, Version 6.0, §§ 301-304 (May 9, 1996) (attached to Defendants’ Motion for Summary Judgment as Exhibit J) (hereinafter the “1996 Ordinance”); Opinion and Order of the Board, App. No. 99-36, Finding of Fact (“FF”) ¶ 38, at 6, Conclusion of Law (“CL”) ¶ 6, at 20 (March 20, 2001) (attached to Defendants’ Motion for Summary Judgment as Exhibit D) (hereinafter “2001 Bd. Op.”).

By contrast, in the R-1 residential district alone, the 1996 Ordinance allows various nonreligious assembly and institutional uses – such as “Municipal Complexes” (which include libraries and administration buildings), “Outdoor Recreation” uses (which include country clubs, club houses, pro shops, and snack bars used by patrons of recreational activities “operated on a commercial or membership basis”), and “Riding Academies” – by special exception. 1996 Ordinance §§ 301.2.B.2.-4., 706.E.8., 706.G.6. In the R-4 residential district, day care centers and nursing homes are allowed by special exception, and life care facilities are allowed as conditional uses. *Id.* § 304.B.1.-2., C.1. Similar exceptions do not apply to houses of worship. *See id.* §§ 301-304.

Similarly, the 1996 Ordinance prohibits houses of worship in all but three of the remaining zoning districts in the Township: Town Commercial, Special Commercial, Planned Business,

Suburban Industrial, Recreation/Conservation, Flood Plain, Land Preservation and Steep Slope Districts. Complaint ¶¶ 40-43; 1996 Ordinance §§ 400-602. Nevertheless, in those same zones, various nonreligious assembly and institutional uses – such as “clubs,” “libraries,” “museums,” “performing theatres,” “amusement parks,” “cultural centers,” and “country clubs” – are permitted, whether by right, by special use, or otherwise. *Id.*

Although houses of worship are permitted in the Apartment/Office District by special exception, nonreligious assembly and institutional uses – such as “clubs,” “community centers,” “cultural centers,” “libraries,” and “museums” – are permitted as of right. Complaint ¶¶ 44-45; 1996 Ordinance §§ 403, 500, 501. Places of worship are permitted as of right only in the Community Service and Mixed Use Districts. *Id.* Combined, these three districts represent a small percentage of the total acreage constituting the Township. *See* Defendants’ Exhibit D (March 20, 2001 Opinion and Order of the Board, Exhibit P-5 (“Zoning Map”). Moreover, the land in those zones is already developed and not for sale, or otherwise incompatible with use as a house of worship. *Id.* *See also* Declaration of Yael Milbert (May 9, 2001) at ¶¶ 4-7 (attached hereto as Exhibit “B”). For example, as of 1992, cemeteries alone occupied 3% to 4% of *all* acreage in Abington, thus excluding the bulk of Community Service zones from even potential use as a synagogue. Comprehensive Plan for Abington Township, Montgomery County, Pennsylvania, 1992, at 61, 69 (attached to Defendants’ Motion for Summary Judgment as Exhibit I) (hereinafter “1992 Plan”). Large hospitals and parks in those zones cut further into the acreage available for purchase for any purpose. *See* Zoning Map.<sup>4</sup>

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<sup>4</sup> At a minimum, these facts create a genuine issue of material fact in response to the Townships’ conclusory assertion that there are “ample opportunities” for the Congregation to locate in Abington Township. Defs. Mem. 20-21.

Before 1990, the predecessor of the “R-1” residential district was called the “V” residential district, which permitted single family homes, “tilling of the soil,” and public libraries, parks, and recreational areas as of right; as well as livestock and nursery uses, school and seminary uses, and private nonprofit libraries, parks, and recreational areas by special exception. 2001 Bd. Op. FF ¶¶ 38-39, at 6; 1978 Ordinance § 301, at 26-28. The pre-1990 ordinance also allowed by special exception a “Church, rectory, parish house, convent, monastery or similar religious institution.” 1978 Ordinance § 301.2.D.3.

On or about March 8, 1990, the Township amended the “V” zone to prohibit all uses but single family homes; to redefine certain accessory uses and lot requirements; and to impose a new height restriction of thirty-five (35) feet. Ordinance No. 1676. In 1996, the Township renamed the “V” district “R-1,” and permitted once again – either as of right or by special exception – all the institutional and assembly uses prohibited in 1990 *except* for schools, seminaries, and the other religious institutional uses previously allowed. *Compare* 1978 Ordinance § 301, at 26-28 *with* 1996 Ordinance § 301, at 18-20.

Also before 1990, Abington Township made no legal distinction between “churches,” “convents,” “monasteries,” classifying and regulating all of them together, along with any other “similar religious *institution*.” 2001 Bd. Op. FF ¶ 37, at 6 (quoting language from 1966 ordinance, which was effective until 1990). Similarly, in 1992, the Planning Commission described “church,” “government,” and “educational” uses together as “institutional” uses, and identified a convent (other than the property at issue here) as the largest institutional use. 1992 Plan, at 68-69. After 1996, the Township defined the (rarely permitted) “Place of Worship” use broadly as “A tax-exempt institution that people regularly attend to participate in or hold religious services, meetings, and other activities

related to religious ceremonies.” 1996 Ordinance § 706.E.10, at 112. The same definition provides that “The term church shall include those buildings and structures in which religious services are held,” but does not similarly define “synagogue.” *Id.*<sup>5</sup>

**B. The Property and the Neighborhood**

The property at issue in this case is located at 1908 Robert Road, Abington Township, Pennsylvania (the “Property”), and is located in the R-1 district. Complaint ¶¶ 20, 38; 2001 Bd. Op. FF ¶ 9, at 2. The Property consists of approximately 10.9 acres of land, including structures occupying approximately 27,000 square feet. Complaint ¶¶ 20, 35; 2001 Bd. Op. FF ¶¶ 2, at 2. Among these structures is a 3,700 square-foot church that can seat approximately 200 to 250 worshippers. Complaint ¶ 35; Opinion and Order of the Board, App. No. 95-33, FF ¶¶ 7-11, at 2 (May 2, 1996) (attached to Defendants’ Motion for Summary Judgment as Exhibit C) (hereinafter “1996 Bd. Op.”). Built in 1957, the church contains an altar, a sacristy, the stations of the cross, confessionals, and stained glass windows. Complaint ¶¶ 22-23; 2001 Bd. Op. FF ¶ 2, 65, at 2, 8; 1996 Bd. Opp. FF ¶¶ 8, 11, at 2; *see generally* Declaration of Mark Levin (May 16, 2001) (attached hereto as Exhibit “C”).

Primary access to the Property is from Valley Road, a main thoroughfare. To reach the Property, visitors would turn from Valley Road on to Frederick Road and proceed on Frederick for approximately 300 feet, passing only four residential lots, two on either side of the road. *See* Zoning

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<sup>5</sup> In addition to the evidence cited above tending to show a preference in the Township’s ordinances between religious and nonreligious uses – as well as between established religious and new religious groups – the Congregation intends to gather more such evidence through pending and planned discovery requests. *See, e.g.*, Plaintiffs’ First Set of Document Requests and Interrogatories to All Defendants, Request For Production No. 1, Interrogatory No. 4 (hereinafter “First Discovery Requests”) (attached hereto as No. 1 of Exhibit A).

Map and Defendants' Exhibit D (March 20, 2001 Opinion and Order of the Board), Exhibit P-19 ("Plan of E. Van Rieker dated 8/15/00") attached thereto. Two of these lots – the first ones passed on either side of Frederick Road – are also bordered by Valley Road roughly to the east. *Id.* Visitors would then turn left on to Robert Road and proceed for approximately 100 feet before turning right into the driveway of the Property. *See* Zoning Map and Defendants' Exhibit D (March 20, 2001 Opinion and Order of the Board), Exhibit P-4 ("Proposed Site Plan dated 11/22/99") attached thereto. During that brief stretch on Robert Road, visitors pass completely only one lot on the right and one on the left (which is the same house already passed on the left while on Frederick Road), and cross in front of only part of another house on the left before turning right into the driveway. *Id.* Robert Road, which is approximately 30 feet wide, continues roughly south for another approximately 300 feet *past* the Property's driveway before it widens into a cul-de-sac of approximately 120 feet in diameter. *Id.* In light of this layout, any traffic entering or exiting the Property could readily be directed to avoid driving any further down Robert Road toward the cul-de-sac, such as by a "No Right Turn" sign facing the Property's driveway; a "No Outlet" sign facing north on Robert Road; a small saw-horse style barricade placed just south of the driveway at peak times to block the west lane of Robert Road; and/or a traffic cop. *See id.*

Abington Township contains approximately thirty-seven (37) houses of worship, approximately twenty-five (25) of which are located in residential zoning districts.<sup>6</sup> Complaint ¶¶ 48, 50; 2001 Bd. Opp. CL ¶ 39, at 22. Among those in residential zones – where new ones are

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<sup>6</sup> Defendants have yet to identify, in response to plaintiffs' document requests, the traffic, noise, parking and lighting impacts, if any, that they have documented in connection with other houses of worship and other institutional uses in residential zones, and what, if any, responsive measures they have taken to curtail those uses in order to reduce those impacts. *See* Discovery Requests RFP Nos. 2-5.

banned entirely – none are Jewish. *Id.* While the Jewish population constitutes approximately 20% of Abington Township, there is only one synagogue, which happens to be in a district zoned “PB” or “Planned Business.” *Id.*

**C. The Prior Religious Institutional Uses of the Property by Catholic Nuns and Orthodox Monks**

In 1951, the Sisters of the Holy Family of Nazareth (the “Sisters”) purchased the Property, which then included 38 acres. Complaint ¶ 22; 1996 Bd. Op. ¶ 14, at 2. Before then, the Property was used as a single family residence. *See* Complaint ¶ 22; 1996 Bd. Op. FF ¶ 7, at 2. The Sisters dramatically altered their Property in order to convert it from its prior, single family use to the institutional use of their convent, including by building the church described above and by adding one story to another building as a dormitory. Complaint ¶ 22; 1996 Bd. Op. FF ¶ 8-14, at 2.

Since it was built in 1957 until 1995, the Sisters daily attended the church on the Property to participate in or hold religious services, meetings, and other activities related to religious ceremonies, such as religious education, sharing meals, recreating, and working. Complaint ¶¶ 21, 22, 24-27, 29; *see* 1996 Ordinance § 706.E.10, at 112. At its peak, the Property accommodated approximately 80 Sisters engaging in these various activities. Complaint ¶ 22; 1996 Bd. Op. FF ¶ 15, at 2. In addition to daily celebration of mass, on numerous major Catholic holidays throughout the year, individuals from outside the Property entered it to join the Sisters in celebrating those days, packing the church to capacity. Complaint ¶ 28; *see* Testimony of Sr. Michaelann Delaney, Transcript of Public Hearing on Application No. 99-36 of Congregation Kol Ami, Vol. No. 1, Monday, January 18, 2000 at 42:4-47:9. Similarly, the Sisters allowed the Property to be used for retreats and special meetings, even as late as 1995 when the Sisters’ population had declined. Complaint ¶ 22; 1996 Bd. Op. FF ¶¶ 16, 30, at 2, 4. Thus, in 1977, the Abington Township Planning

Commission classified the Property as a “convent” that serves “several purposes” – including use as a chapel, novitiate, and retreat house – in contrast to another convent use whose “primary purpose is residential.” Abington Township Pennsylvania Comprehensive Plan 1977, at 71 (attached to Defendants’ Motion for Summary Judgment as Exhibit F) (hereinafter “1977 Plan”); *see* Complaint ¶ 22.

Due to the decline in the population of the Sisters, the Sisters leased the Property to the Greek Orthodox Monks in 1995, also for use as a religious institution. Complaint ¶ 31. Like the Sisters, the Monks desired to use the Property for religious services, family retreats, religious study, and prayer. Complaint ¶ 33; 1996 Bd. Opp. FF ¶¶ 23, 25, 28, at 3. In deciding to permit the use, Defendant Zoning Hearing Board (“ZHB”) repeatedly referred to the Sisters’ use of the Property as a convent as an “institutional” use, and correspondingly found it would have been prohibitively expensive for the Sisters to convert the convent back to a “residential” use. 1996 Bd. Opp. FF ¶¶ 8, 10, 14, 20, at 2, 3; *see* Complaint ¶ 32. The ZHB further found that use to be “nonconforming,” and that the Sisters did not intend to abandon that use, even though they desired to sell it. 1996 Bd. Opp. FF ¶ 17, at 2, CL ¶ 3, 4, at 4; *see* Complaint ¶ 32. Finally, the ZHB found that “to deny this application would impose an unnecessary hardship on the applicant,” namely the Monks who would otherwise have to seek another location for their religious exercise.

Thus, from 1995 through 1999, the Monks daily attended the church on the Property to participate in or hold religious services, meetings, and other activities related to religious ceremonies, such as religious education, sharing meals, recreating, and working. Complaint ¶¶ 33-34; 1996 Bd. Opp. ¶ 23, 25, 28, at 3; *see* 1996 Ordinance § 706.E.10, at 112.

**D.     The Proposed Religious Institutional Use of the Property by Congregation Kol Ami**

In August 1999, the Congregation entered into an agreement with the Sisters to purchase the Property for use as a synagogue. Complaint ¶ 36. Plaintiffs proposed the following regularly scheduled uses of the Property: (1) *Shabbat* services on alternate Fridays and Saturdays for up to an hour and a half; (2) Hebrew classes on Wednesdays from 4:00pm to 8:00pm; (3) religious classes for 2 hours on Sunday mornings. Complaint ¶ 57; *See* testimony of David Sloviter, Transcript of Public Hearing on Application No. 99-36 of Congregation Kol Ami, Vol. No. 1, Monday, January 18, 2000, at 115:12 – 123:25 (hereinafter “Sloviter Testimony”).<sup>7</sup> This comprises less than 8 hours of regularly scheduled activity per week, and none on Mondays, Tuesdays, Thursdays and alternate Fridays and Saturdays. Complaint ¶ 57; Sloviter Testimony at 122:4-17. Other uses would include four High Holiday services per year, religious meetings and *Bar* and *Bat Mitzvah* services. Complaint ¶ 58; Sloviter Testimony at 124:2-134:5. The facilities of the Property would be used in a similar manner to that of the Sisters: worship services would be held in the Chapel; receptions would be held in the Dining Room; *Oneg Shabbat* gatherings would be held in the Hall; the Congregation would use the Sisters’ classrooms and dormitory rooms for its own religious education and administrative offices. Complaint ¶ 59; Sloviter Testimony at 134:16-139:3.

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<sup>7</sup> Copies of the relevant portions of transcripts of testimony before the ZHB leading up to its March 20, 2001 decision are of record and contained as Exhibit K to Defendants’ Motion to Dismiss filed on June 15, 2001. In addition to testimony of David Sloviter, such testimony also includes that of: Stuart G. Rosenberg, Charles L. Guttenplan, William Francis Clinton, Elinur Maier and Sister Michaelann Delaney.

Driveways on the Property would be altered substantially, parking areas added to comply with Abington Township standards, as well as the addition of screening and buffering. Complaint ¶ 60; *see* Sloviter Testimony at 143:22-144:8. *See also*, Testimony of Stuart G. Rosenberg, Transcript of Public Hearing on Application No. 99-36 of Congregation Kol Ami, Vol. No. 2, Tuesday, February 29, 2000 at 140:19-141:7, 172:12-21 (hereinafter “Rosenberg Testimony”); Testimony of Charles L. Guttenplan, Transcript of Public Hearing on Application No. 99-36 of Congregation Kol Ami, Vol. No. 3, Thursday, March 2, 2000 at 54:11-57:24 (hereinafter “Guttenplan Testimony”). *Compare* Defendants’ Exhibit D (March 20, 2001 Opinion and Order of the Board), Exhibit A-12 (“Amended Site Plan”) attached thereto *with* Exhibit A-12B (“Existing Conditions”) attached thereto (demonstrating construction of new driveways and parking spots for proposed use as well as modified uses of buildings).

**E.     The Township’s Denial of Kol Ami’s Religious Institutional Use of the Property**

Plaintiffs submitted an application to the ZHB requesting permission to use the Property as a place of worship, as above, either by the ZHB finding that the proposed use is a continuation of a prior, nonconforming, religious institutional use of the Property, or by the ZHB granting a variance to allow the proposed use. Complaint ¶ 54; 2001 Bd. Op. FF ¶ 15, 16, at 4. Several neighbors who objected to the location of a synagogue in their neighborhood intervened to protest plaintiffs’ application. Complaint ¶ 62; 2001 Bd. Op. FF ¶ 11, at 2. These intervenors objected to the synagogue in their neighborhood regardless of any conditions or restrictions upon the use. Complaint ¶ 62; *see* Testimony of William Francis Clinton, Transcript of Public Hearing on Application No. 99-36 of Congregation Kol Ami, Vol. No. 7, Tuesday, July 18, 2000 at 132:3-13; *see* Testimony of Elinur Maier, Transcript of Public Hearing on Application No. 99-36 of

Congregation Kol Ami, Vol. No. 7, Tuesday, July 18, 2000 at 162:9-16<sup>8</sup>. Plaintiffs repeatedly offered to make any reasonable alterations to minimize whatever impact – or perceived impact – the Congregation may cause, including installing berms, landscaping, and fencing, relocating driveways, hiring traffic monitoring personnel and curtailing evening activities. Complaint ¶ 65; *See* Sloviter Testimony. The intervenors rejected all of these suggestions. Complaint ¶ 65; *see* Maier Testimony 162:9-16.<sup>9</sup>

Experts testifying in support of the Application were a land planner, a civil engineer, a traffic engineer, an architect, an attorney. Complaint ¶ 61; 2001 Bd. Op. FF ¶¶ 93, 135, 160, 211, at 10, 13, 15, 19. Plaintiffs also offered the testimony of Sister Michaelann Delaney, Provincial Superior of the Sisters; David Sloviter, President of the Congregation; plaintiff Elliot Holin, Rabbi of the Congregation; and owners of homes on immediately adjacent properties who supported the Congregation’s proposed use. Complaint ¶ 61; 2001 Bd. Op. FF ¶¶ 53, 132, 152, at 7, 13, 14.

Now that the proposed use of the Property involved a new Jewish rather than an established Christian congregation, the ZHB changed its tune dramatically. *See* Complaint ¶47; *compare* 1996

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8 Q. Last question. Would there be any set of conditions under which you would find the presence of Kol Ami as it is currently constituted acceptable to you?

A. No.

Q. In other words, if limitations were put on them would there be a set of limitations that you -

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A. No. I’m just opposed to having them back there.

Maier Testimony at 162:9-16.

<sup>9</sup> Plaintiffs expect to discover further evidence tending to show that the neighbors opposing the Congregation’s application were animated by discriminatory and / or irrational motives. *See* First Discovery Requests RFP Nos. 3, 4, 6, Int. No. 3. Notably, none of the testimony of the neighbors which informed the decision making of the ZHB, nor of their repeated rebuffing of the Congregation’s offers to take mitigating measures, was called to the attention of the Third Circuit during the appeal of the narrow issue decided on summary judgment.

Bd. Op. *with* 2001 Bd. Op. Rather than allow the Congregations' proposed religious use subject to conditions designed to address the concerns asserted by neighbors – as it had done in 1996 – the ZHB denied the Application in its entirety. Complaint ¶ 63; 2001 Bd. Op. at 23. Suspicious determinations by the ZHB include, without limitation, the following:

- The ZHB backed away from its 1996 determination that the Sisters' use was a prior nonconforming *institutional* use that they had wished to sell to the Monks, 1996 Bd. Op. FF ¶¶ 8, 10, 14, 17, 20, at 2, 3, now claiming that the Sisters' use was a conforming *residential* use all along, so that they never had a nonconforming use to sell the Monks. 2001 Bd. Op. CL ¶ 7, 11, at 20.
- The ZHB argued, in the alternative, that even if the Sisters did have a nonconforming use, they intended to abandon it. 2001 Bd. Op. CL ¶ 13, at 20. But this inference of intent was based on conduct undertaken by the Sisters before 1996, *see* 2001 Bd. Op. FF ¶¶ 49-51, 56-59, at 7, 8, CL ¶¶ 14-16, at 21, when the ZHB specifically found that the Sisters did *not* intend to abandon their nonconforming institutional use. 1996 Bd. Op. FF ¶ 17, at 2, CL ¶ 4, at 4.
- The ZHB found also more specifically that the Sisters' use "was permitted in the V-Residential District as a residential use." 2001 Bd. Op. CL ¶ 11, at 20. But the only residential use permitted in that district was "single family detached dwelling," 1978 Ordinance § 301.2.A., which the convent plainly was not, both because the number of Sisters typically exceeded the number of individuals that reasonably could occupy any single family dwelling, and because the Sisters were not related to each other. 2001 Bd. Op. FF ¶¶ 69-71, at 8-9.
- When asked at deposition what informed the ZHB's revisionist conclusion that the Sisters really lived in a "single family residence" after all, the Township's Planning and Zoning Officer began discussing his religiously informed view that up to 80 nuns living together constitute a single family for purposes of the zoning code. *See* Deposition of Mark A. Penecale (July 5, 2001 (attached hereto as Exhibit "D"), at 43: 16-22 ("Penecale Dep.")(“Because the whole premise of the Christian faith with a nun is that they are married. They are married to the same individual. Therefore, they fit the description of no more than one individual related related by either blood or marriage.”).

- That same Township official noted that, “If a convent came in today, I might give them an occupancy certificate *just on the basis that they are a convent.*” Penecale Dep. 43:14-16 (emphasis added). On top of that, he could not identify a similar Jewish form of “residence” to which he would extend the same preferred treatment. *See id.* at 45:1-14.
- Although the ZHB found that “The principal use of the Property by the Monks was residential,” the ZHB offered no explanation as to why that use required a variance in 1996. 2001 Bd. Op. CL ¶ 10, 17, at 20, 21.
- The ZHB rejected the sworn testimony of Sr. Michaelann Delaney – who lived on the Property herself for at least two years and later exercised religious authority over the activities occurring therein – as “not credible” regarding activity at the Property, and preferring instead the testimony of neighbors – who lack *any* inside knowledge of, or supervisory role over, the activities of the convent – generalizing from activities they did *not* see occur at the Property. 2001 Bd. Op. FF ¶¶ 88-91, 199, 201, at 10, 18. The fact that neighbors did not witness certain activities does not even approach “directly contradict[ing]” other testimony tending to show that those activities nonetheless occurred: the neighbors simply did not see the activities when they happened. *Id.*
- Similarly throughout, whenever the ZHB assessed the credibility of the Congregation’s witnesses, it invariably found them lacking, and just as consistently found the intervenors’ witnesses credible. Complaint ¶ 63; *see, e.g.,* 2001 Bd. Op. FF ¶¶ 199, 203, 211, 215, at 18, 19.
- The ZHB omitted from its 2001 findings facts it had found in 1996 – and that were still both true and relevant – but tended to show the intensity of the Sisters’ use, such as: that the church occupies 3,700 square feet and could seat over 200 worshipers; that over 80 Sisters represented the peak use of the convent; that the Property had been expanded to sleep far more than any single family ever would; that modifying the Property back to single-family use would be prohibitively expensive. *See* 1996 Bd. Op. FF ¶ 10, 11, 15, 20, at 2, 3.
- Although the ZHB found the convent to involve the use of between 20 and 50 Sisters at a time through the 1970s (ignoring its 1996 finding of over 80), the ZHB credited testimony that deliveries to the Property were “limited” and that the Sisters’ use generated “no traffic” and “never [involved] large gatherings of people.” 2001 Bd. Op. FF ¶¶ 69-71, 201, at 9, 18.

- Although the ZHB lists all the Congregations proposed uses, the ZHB alternately omits and distorts uncontradicted evidence tending to show that most of these activities will occur regularly but infrequently, so that neighborhood impacts, if any, would typically occur during only a few hours per week. *See, e.g.*, 2001 Bd. Op. FF ¶¶ 131, 139, at 13 (omitting that Wednesday classes would be limited to 4 hours, Sunday classes limited to 2 hours, and *Shabbat* services limited to 1.5 hours on *alternate* Fridays and Saturdays).
- Although the ZHB found that the Congregation consisted of 558 members and 207 families (an average of 2.7 members per family), it found more credible that members' vehicles would include 2 persons per trip (as the intervenors' expert testified) rather than 3 (as the Congregation's expert testified). 2001 Bd. Op. FF ¶¶ 127, 128, 169, at 12, 15.

In short, the ZHB bent over backwards to force the outcome against Congregation Kol Ami, as part of the Township's broader pattern of disfavor to new and minority religious groups.<sup>10</sup> Complaint ¶ 47. The ZHB made these decisions pursuant to a system of individualized assessments. *See* Complaint ¶¶ 67-69.

**F. The Substantial Burden Imposed on Kol Ami by the Township's Denial of Kol Ami's Religious Institutional Use of the Property**

Congregation Kol Ami is a new Reform Jewish congregation, founded in 1994. Declaration of David Sloviter (May 10, 2001) ¶ 2 (hereinafter "Sloviter Decl.") (attached hereto as Exhibit "E"). Its religious mission has been suffering – and continues to suffer – for lack of a permanent facility. Complaint ¶¶ 11-18; Sloviter Decl. ¶¶ 17-27; Declaration of Elliot J. Holin (May 10, 2001) ¶¶ 6, 7,

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<sup>10</sup> Notably, these bulleted items were not briefed, argued, or otherwise called to the attention of the Third Circuit panel on appeal, rendering that much less remarkable the panel's observation that there was no evidence of anti-Jewish or anti-religious animus before it. Moreover, through outstanding discovery requests – including document requests, interrogatories, and scheduled depositions – Plaintiffs intend to explore further the role of impermissible religious motives in the determinations of the ZHB regarding Kol Ami's application. *See, e.g.*, Plaintiffs' First Set of Discovery Requests and Interrogatories to All Defendants, Req. Nos. 4, 6; Int. No. 3; Auerbach Decl. (describing unanswered pending discovery and anticipated discovery).

18-22 (hereinafter “Rabbi Holin Decl.”) (attached hereto as Exhibit “F”). It currently pursues parts of its mission at a variety of temporary locations, such as holding worship services at Gratz College, religious school at Congregation Melrose B’ nai Israel Emanuel, Passover *Seder* at the Gymnasium of Abington Friends School, and High Holy Days at the Keswick Theater. Complaint ¶ 12; Rabbi Holin Decl. ¶¶ 6,7; Sloviter Decl. ¶¶ 11-15.

This wandering has resulted in a disjointed Congregation, forcing the cancellation and diminishing the quality and frequency of religious events; hindering both communication of the Rabbi’s religious message – including education of the young – and fellowship among the congregants; eroding membership and financial support; and placing the Congregation’s most sacred possession – an ancient *Torah* that has survived the Holocaust – at increased risk of destruction. Complaint ¶ 13, 15-18; Rabbi Holin Decl. ¶¶ 6-7, 17-19, 22; Sloviter Decl. ¶¶ 11-27. Moreover, Plaintiffs’ religious convictions call for the Congregation to occupy a home that is both permanent and in a residential neighborhood. Complaint ¶ 13; Rabbi Holin Decl. ¶¶ 4, 5, 8, 9.

In order to fulfill these needs, a permanent home must contain structures adequate for religious worship and related gatherings, as well as some outdoor space for reflection and celebration of religious holidays such as *Sukkot*; it must be reasonably central to where members of the Congregation live; and it must accommodate the current members and allow for some future growth. Complaint ¶ 14; Rabbi Holin Decl. ¶¶ 4, 21; Sloviter Decl. ¶¶ 7, 25-27. Abington Township’s zoning laws have made such a property especially difficult to find, because they have dramatically reduced the number of properties in the Township where religious assembly uses are permitted. Complaint ¶¶ 39-46; *see* Zoning Map.

After a long and exhaustive search, it was determined that the Property at 1908 Robert Road is the only property in Abington Township that fulfilled the Congregation's needs. Complaint ¶¶ 13, 19, 37; Sloviter Decl.¶¶ 5-10; Milbert Decl.¶¶ 4-7. The Township has prohibited the Congregation from occupying that Property, which is otherwise available for sale to the Congregation, and which the Congregation has found would meet its religious needs. Complaint ¶¶ 19, 36, 37, 63; *see generally* 2001 Bd. Op. Plaintiffs' agreement with the Sisters to purchase the Property is contingent upon the Congregation's ability to obtain all necessary approvals. Complaint ¶ 36; 2001 Bd. Opp. FF ¶ 2, at 2. Plaintiffs have paid the Sisters \$137,500 in deposits and carrying costs. Complaint ¶ 36. Plaintiffs' costs in carrying the Property continue to accrue at a rate of \$20,000 per year. *Id.*

**G. The Civil Rights Complaint and This Court's Grant of Summary Judgment**

On April 18, 2001, the Congregation initiated this action by filing a thirteen count complaint, sounding primarily in federal constitutional and statutory law. *See* Complaint; Defs. Mem. 7-9. Less than two months later, on June 13, the Congregation moved for partial summary judgment on a small subset of facial challenges to the Abington Ordinance that did not involve factual disputes. Specifically, the Congregation challenged the Ordinance primarily on the grounds that its categorical ban on houses of worship in all residential zones, on its face, fails rational basis scrutiny under the Due Process and Equal Protection Clauses. The Congregation also claimed the ordinance was facially unreasonable under the equal protection analysis of *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985), because the ordinance prohibited houses of worship in a residential zone but allowed similarly intensive uses in the same zone by special exception and, in some cases, by

right. Pltfs. 6/13/01 SJ Mem. 10-12 (“Thus, the very terms of the Ordinance contain not only a *per se* irrational ban on religious uses in residential zones, but the same sort of inconsistency regarding intensity of use that the Supreme Court found irrational in *Cleburne*.”). In response, the Township defended the ordinance as constitutional both “on Its Face *and As Applied*,” Defs. SJ Opp. 6 (emphasis added), and presented evidence in support of the claim that the ordinance was applied constitutionally, specifically because it was applied to address government concerns over traffic, noise, and light. *Id.* at 13-14.

On July 11, 2001, based on the limited record before it, this Court found that the Abington Ordinance, as applied, violated the Equal Protection Clause under the *Cleburne* analysis. 161 F. Supp. 2d 432 (E.D. Pa. 2001). Specifically, the Court reasoned:

Not only does a house of worship inherently further the public welfare, but defendants' traffic, noise and light concerns also exist for the uses currently allowed to request a special exception. Indeed, there can be no rational reason to allow a train station, bus shelter, municipal administration building, police barrack, library, snack bar, pro shop, club house, country club or other similar use to request a special exception under the 1996 Ordinance, but not Kol Ami. Because the ZHB failed to consider whether traffic, noise, light or other disruptions warrant the denial of a special exception, and failed to apply the 1996 Ordinance in a way that accounts for that Ordinance's differing treatment of Kol Ami from the other permitted uses by special exception, the Court finds that defendants denied plaintiffs rights secured by the Constitution.

*Id.* at 437. Accordingly, on July 20, this Court ordered the Township promptly to grant the Congregation the same special exception hearing it would have received if it were a country club or a library. *See* 2001 U.S. Lexis 10224 (E.D. Pa. July 20, 2001).

#### **H. The Second Decision of the Zoning Hearing Board**

Pursuant to the July 20 Order, the ZHB conducted the special exception hearing between August 6 and August 9, 2001, including a view of the Property. Opinion and Order of the Board,

App. 99-36, Finding of Fact (“FF”) ¶¶ 23-24, at 4 (August 15, 2001) (“8/15/01 Bd.Op.”) (attached hereto as Exhibit “G”). Though the Township and its Commissioners could have opposed the application, they declined to do so. 8/15/01 Bd.Op. ¶ 8, at 2. On August 15, the ZHB issued its decision granting the special exception. *Id.*, Conclusion of Law (“CL”) ¶ 12, at 14. The ZHB acknowledged that the use “will not adversely affect the health, safety and welfare of the community,” and that it “is consistent with the spirit, purpose, and intent of the Ordinance.” *Id.* CL ¶¶ 10, 11, at 14. Thus, rather than prohibit the use altogether as before, the ZHB allowed the use but imposed limitations directed at traffic, light pollution, and noise. *Id.* ¶¶ 1-26, at 14-16. Several months later, the Township approved the Congregation’s land development plan. *See* Letter from Matteo to Friedman (Apr. 12, 2002) attached hereto as Exhibit “H” (“Matteo Letter”). Nonetheless, the Township persisted in its appeal.

**I. The Decision of the Third Circuit and Activity on Remand**

On October 16, 2002, the Third Circuit vacated and remanded the decision of this Court, and declared null and void the special exception granted on August 15. Specifically, the Court concluded that:

because the District Court did not address the similarity of uses question, and the Abington Ordinance is not so clearly drafted that we may definitively determine what uses are permitted by special exception on our own. Put differently, because the District Court failed to evaluate whether the Congregation was similarly situated, i.e., similar in “kind,” to the uses that are currently permitted in the R-1 Residential District, we must vacate its order and remand so that the proper inquiry may be conducted. Since the special exception hearing was held pursuant to an improper order by the District Court, the resulting grant of special exception by the ZHB and the land use permit issued by the Township are null and void.

309 F.3d at 125-26. Notably, the Court of Appeals did not rule on the alternative grounds for affirmance on appeal under the Due Process and Free Exercise Clauses, or on any other of the

thirteen counts of the Complaint. In fact, the Court specifically noted that the Congregation’s facial challenge to the ordinance – which, as will be discussed further below, the Court of Appeals appears to have misunderstood – “need[s] to be considered on remand as well.” *Id.* at 144.

Soon after the case returned to this Court’s jurisdiction on November 29, 2002, the Congregation requested a conference under Rule 16(f) in order to set a schedule for responses to outstanding discovery requests, and for propounding additional requests in light of the Third Circuit’s ruling. Rather than respond favorably to this request, the Township promptly filed this motion, which is virtually a refile of its Motion to Dismiss and/or for Summary Judgment of June 15, 2001 (hereinafter “Defs. June 2001 Motion”).

## **ARGUMENT**

### **I. DEFENDANTS’ MOTION IS PREMATURE AND SHOULD BE REJECTED PURSUANT TO F.R.C.P. 56(F)**

Defendants’ motion for summary judgment is premature, because discovery has scarcely even started in this case. Thus, Plaintiffs have not yet had the opportunity to obtain information that is essential to their claims. As explained below, all three factors to be considered under Rule 56(f) indicate that summary judgment would be premature in this case without further discovery. *See San Filippo*, 30 F.3d at 432 (identifying three relevant factors, “what particular information is sought; how, if uncovered, it would preclude summary judgment; and why it has not been previously obtained.”) (internal quotations omitted).

**What information is sought.** Plaintiffs seek information in several areas relevant to their various statutory and constitutional claims. More specifically, Plaintiffs seek discovery regarding: (1) the discriminatory intent of government officials in passing and amending the Abington

Ordinance; (2) the discriminatory intent of government officials in applying the Abington Ordinance to Kol Ami in this case; (3) the full range of circumstances surrounding all land-use decisions involving the prior religious uses of the Property; (4) the Township's pattern of decision in granting continuing uses and variances for other uses, including other houses of worship; (5) the full range of uses that the Township has actually allowed to apply for special exceptions; (6) the Township's asserted interests of traffic, noise and light pollution; (7) the means available to the Township – short of the complete prohibition of Kol Ami's proposed use – to address those asserted interests. All of these facts lie within Defendants' personal knowledge.

**How this information would preclude summary judgment.** The discovery above would preclude summary judgment by providing some of the evidence that would help satisfy the elements of the Congregation's various federal and state constitutional and statutory claims. The importance of each category of evidence will be set forth in greater detail below in the count-by-count discussion of each claim. As that detailed account reveals, the need for discovery varies from claim to claim, and for some (if not all) claims the Congregation has already gathered enough relevant evidence on its own – without the benefit complete discovery responses from the Township – to generate an issue of material fact sufficient to preclude summary judgment. Even so, the Congregation is entitled to an adequate discovery period in order to have a full and fair opportunity to meet its burden of production before the Court renders its decision on the Township's present motion.

**Why this information has not been obtained previously.** Plaintiffs have diligently pursued the pending discovery they currently await and expect to receive, and have actively sought the opportunity to propound the additional discovery specifically contemplated by the recent decision of the Third Circuit. *See* Auerbach Decl., Exhibit A hereto. Plaintiffs' first set of document requests

and interrogatories, which were originally propounded on June 14, 2001, have not been answered completely. For example, although the Township made some documents available for review on July 23-24, 2001, the Township never provided the requested copies of the particular documents that the Congregation identified as potentially relevant. *See* Auerbach Decl., ¶ 12. The Township has not responded to a single one of the Congregation’s interrogatories. *See id.*, ¶¶ 5, 13. Although the Congregation took the depositions of Lawrence Matteo, Mark Penecale, and Barbara Ferrara on July 5, 2001 – just a week before this Court granted the Congregation summary judgment – other depositions remain uncompleted. *See id.* ¶¶ 9, 10.

In addition, soon after this matter returned to this Court’s jurisdiction in late November 2002, Plaintiffs requested a scheduling conference, as is appropriate under F.R.C.P. 16(f), in order to propose a reasonable timetable both for responses to the Congregation’s still-pending discovery requests, and for propounding additional discovery in light of the Third Circuit’s decision. *See* Auerbach Decl. ¶ 19. Notwithstanding Defendants’ awareness of their outstanding discovery obligations from July 2001 – and notwithstanding the Third Circuit’s specific contemplation of further discovery regarding uses “similarly situated” to this synagogue, *see Kol Ami*, 309 F.3d at 142 – Defendants ignored the Congregation’s initiative to schedule that discovery. Defendants preferred instead to obstruct that initiative by filing the present motion – essentially the same, premature motion for summary judgment filed in June 2001, with only minor revisions. Thus, the Congregation’s diligence in pursuing discovery supports its request that this Court either deny or continue the Township’s summary judgment motion. *Costlow v. United States*, 552 F.2d 560, 564 (3d Cir. 1977) (“[B]y acting on the motion for summary judgment without argument, and without

reference to what might be developed in discovery, which was being diligently pursued, the court erred.”).

Accordingly, Plaintiffs respectfully request that the Court deny Defendants’ motion for summary judgment without prejudice to renew at the appropriate time, or order a continuance to permit Plaintiffs to obtain both the discovery they have already requested, and the additional discovery they will request in light of the Third Circuit’s recent decision under the Equal Protection Clause. *Sames v. Gable*, 732 F.2d 49, 51 (3d Cir. 1984) (“This court has criticized the practice of granting summary judgment motions at a time when pertinent discovery requests remain unanswered by the moving party.”).

**II. GENUINE ISSUES OF MATERIAL FACT AND INCOMPLETE DISCOVERY REGARDING EVERY COUNT OF PLAINTIFFS’ COMPLAINT PRECLUDE SUMMARY JUDGMENT**

**A. Genuine Issues of Material Fact and Incomplete Discovery Preclude Summary Judgment on Count I, Plaintiffs’ Claim Under the Federal Free Exercise Clause**

**1. Summary judgment should be denied on Plaintiffs’ claim that Abington’s Ordinance, both on its face and as applied, discriminates on the basis of religion**

In *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993), the Supreme Court set forth the general standard for assessing the constitutionality of state action under the Free Exercise Clause of the First Amendment:

“[I]f the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral, *see Employment Division v. Smith*, 494 U.S. 872, 878-79 (1990), and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest.”

*Lukumi*, 508 U.S. at 533.

Although Defendants fail to cite the case even once in any of their papers, *Fraternal Order of Police v. City of Newark*, 170 F.3d 359 (3d Cir. 1999), represents controlling Third Circuit law further interpreting and applying the *Lukumi / Smith* standard. (That failure is especially egregious in light of the Congregation’s calling this omission to the Township’s attention in response to the Township’s similar motion in June 2001.) *Fraternal Order of Police* presented the question whether a no-beards policy with an exception for medical reasons triggered heightened scrutiny for failure to provide a similar exception for religious reasons. 170 F.3d at 365-66. The court found that the case did *not* present a circumstance of “individualized assessments,” such that the pre-*Smith* “substantial burden” test would apply. *Id.* at 365; *see infra*. Instead, the court applied strict scrutiny because it found the law to target conduct based on its religious motivation:

“[I]t is clear from [*Smith* and *Lukumi*] that the Court’s concern was the prospect of the government’s deciding that *secular motivations are more important than religious motivations*. If anything, this concern is only further implicated when the government does not merely create a mechanism for individualized exemptions, but instead, actually creates a categorical exemption for individuals with a secular objection but not for individuals with a religious objection.

*Id.* (emphasis added). Thus, the Free Exercise Clause protects not only against the persecution of religious minorities or other forms of “sect discrimination,” Defs. Mem. 13, but against targeting religiously motivated conduct for worse treatment than secular conduct. *Lukumi*, 508 U.S. at 532 (“At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons.”). Here, both categories of impermissible conduct are implicated.

First, as detailed above, the 1996 Ordinance treats religious institutional and assembly uses differently and worse than nonreligious ones. *See supra* Factual Statement Section A (discussing

ordinance). Wherever religious assembly uses are banned, nonreligious uses are allowed at least by special exception. *See, e.g.*, 1996 Ordinance §§ 301-304 (defining Abington’s residential districts). Where religious assembly uses are allowed by special exception, secular uses are allowed as of right. *See, e.g., id.* §§ 403, 500, 501 (defining Apartment / Office district). The sequence of the amendments – in which all nonreligious assembly uses *but churches* were restored to R-1 neighborhoods – further illustrates how religious assemblies were targeted for exclusion. *Compare* 1978 Ordinance § 301 *with* 1996 Ordinance § 301. Thus, the Ordinance reflects the Township’s decision “that secular motivations are more important than religious motivations.” *FOP*, 170 F.3d at 365. The differential treatment of assemblies across religious lines triggers strict scrutiny under the Free Exercise Clause, whether or not accompanied by “animus” against religion generally.<sup>11</sup> *See Smith*, 494 U.S. at 886 n.3 (“Just as we subject to the most exacting scrutiny laws that make classifications based on race, or on the content of speech, we strictly scrutinize governmental classifications based on religion.”) (citations omitted); *see, e.g., id.* at 877-78 (describing “assembling with others for a worship service” as conduct that government cannot prohibit “only when ... engaged in for religious reasons”).

Second, the 1996 Ordinance institutes a system of sect preferences. By prohibiting houses of worship in the residential districts to which they gravitate – as well as by drastically limiting elsewhere the pool of real estate even potentially available for that use – the 1996 Ordinance unmistakably targets minority and less well-established religions for exclusion from Abington Township. Moreover, careful examination of the ZHB’s opinion also reflects irrational hostility in

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<sup>11</sup>Discovery may yet reveal this kind of animus, as the Congregation’s unanswered discovery includes requests for further detail regarding the passage of the Ordinance and its amendments.

the application of the Ordinance in this case: the dramatic inconsistencies of the opinion – with the evidence presented to the ZHB, with its prior findings from 1996, and within the opinion itself – all evince an intent to exclude Kol Ami without regard to the factual merits of its application. *See supra* Factual Statement, Section E (discussing suspicious findings of ZHB). Moreover, in a deposition after summary judgment briefs had been filed, the Township’s Planning and Zoning Officer revealed that impermissible religious factors inform his application of the Ordinance, and that Christian and Jewish religious institutions would be treated differently under the law. Penecale Dep. 43, 45.<sup>12</sup> Therefore, summary judgment should be denied on this part of the Congregation’s Free Exercise claim.

**2. Summary judgment should be denied on Plaintiffs’ claim that Abington’s Ordinance imposes a substantial burden on their free exercise of religion**

Plaintiffs plan to demonstrate that not only is their inability to have a synagogue—a *home for their congregation*—a burden on their religious exercise that is both substantial and ongoing, this burden has *increased* during the course of this litigation and will not cease until relief is provided by this Court. Moreover, as was most notably demonstrated by the Township’s own finding that the Congregation’s proposed use “will not adversely affect the health, safety and welfare of the community,” 08/15/01 Bd. Op., the Township lacks any rational—much less compelling—interest

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<sup>12</sup>It is unclear at this stage of the proceedings whether the hostility reflected in the decision of the Board is the same hostility to new and minority faiths that is reflected in the Ordinance, or some other form of religion-based or irrational hostility. Discovery may reveal, for example, that the hostility is particularly “anti-Jewish,” or even more particularly opposed to the religion of this Congregation only. In any event, it is unsurprising that the Court of Appeals found “no evidence of anti-Jewish or anti-religious animus in the record,” *Kol Ami*, 309 F.3d at 143, because the Congregation has not (yet) claimed that the Township harbors those particular forms of animus.

in preventing the Congregation from using its property as a synagogue. Finally, as has been amply demonstrated (again, by the Township itself), the Township has many ways to serve *any* asserted governmental interest in a manner that is less restrictive of the Congregation’s religious exercise than the outright banning of its existence in Abington Township. *See, e.g.*, 08/15/01 Bd. Op. at 14-16 (outlining 26 different conditions limiting the Congregation’s impact on the community).

- a. **Strict scrutiny applies to the substantial burden imposed in this case, both because it was imposed pursuant to a system of individualized assessments, and because it trammels related fundamental rights**

**Individualized Assessments.** Notwithstanding Defendants’ arguments to the contrary, the Supreme Court in *Smith* did not overrule its prior decisions applying the “substantial burden” test, but instead simply distinguished those cases from neutral laws of general applicability, such as the drug prohibition at issue in *Smith*. *See Smith*, 494 U.S. at 884. Specifically, the *Smith* Court, and later the *Lukumi* Court, found that those precedents—such as *Sherbert v. Verner*, 374 U.S. 398 (1963), *Thomas v. Review Board of Indiana*, 450 U.S. 707 (1981), and *Hobbie v. Unemployment Appeals Comm’n of Fla.*, 480 U.S. 136 (1987)—are still viable in situations involving “individualized governmental assessment of the reasons for the relevant conduct.” *Id.*; *Lukumi*, 508 U.S. 537; *see Fraternal Order of Police*, 170 F.3d at 364-65 (noting that “individualized assessments” exception to *Smith* general rule applies outside unemployment context). Thus, in those circumstances, the State is still required to justify a “substantial burden” on religious exercise “by showing that it is the least restrictive means of achieving some compelling governmental interest.” *Thomas*, 450 U.S. at 718.

The Township argues that the application of land use laws (such as the denial of a variance) are more like the outright drug prohibition in *Smith* than the discretionary unemployment compensation determinations in *Sherbert*. Contrary to this assertion, courts have repeatedly found that this is obviously not the case. This Court itself has stated that “no one contests” that the application of land use laws “by their nature impose individualized assessment regimes” and therefore are “of necessity different from laws of general applicability.” *Freedom Baptist Church of Delaware Cy. v. Tp. of Middletown*, 204 F. Supp. 2d 857, 868 (E.D. Pa. 2002) (upholding constitutionality of RLUIPA) (emphasis added).<sup>13</sup> Yet, Defendants persist, and the Congregation will therefore present the vast bulk of authority that supports its position.<sup>14</sup>

Nearly every single court that has been presented with the question of whether zoning laws are “systems of individualized assessments,” see *Employment Division v. Smith*, 494 U.S. 872 (1990) (recognizing continued vitality of previous Supreme Court cases in which strict scrutiny was applied to laws entailing “individualized assessments”)—including this one—has answered it in the affirmative. It is patently obvious that land use decisions such as denial of a variance always involve

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<sup>13</sup> Amazingly, the Township does not even cite this Court’s *Freedom Baptist Church* decision anywhere in its Memorandum.

<sup>14</sup> The wholly discretionary and multifactor test for determining whether a variance should be granted is found in Plaintiffs’ Complaint ¶ 56 (quoting Zoning Ordinance §§ 1201-02), and includes such factors as “consisten[cy] with the spirit, purpose, and intent of this Ordinance,” whether it would “[a]dversely affect in any other manner the public health, safety, morals or general welfare,” and whether “a strict interpretation or literal enforcement of the provisions of this chapter would result in an unnecessary hardship.” The standard for determining whether a use is a continuing nonconforming use is found at Zoning Ordinance § 1110C. Both sets of standards clearly create a “system of individualized assessments.”

individualized, subjective judgments by local government officials.<sup>15</sup> As Judge Dalzell held in a recent church zoning case:

No one contests that zoning ordinances must by their nature impose individual assessment regimes. That is to say, land use regulations through zoning codes necessarily involve case-by-case evaluations of the propriety of proposed activity against extant land use regulations. They are, therefore, of necessity different from laws of general applicability which do not admit to exceptions on Free Exercise grounds. *See Smith*, 494 U.S. at 890, 110 S. Ct. 1595.

*Freedom Baptist Church*, 204 F. Supp. 2d at 868. *See id.* (“After *Smith* was decided, the Supreme Court confirmed that the presence of ‘individualized assessments’ remains of constitutional significance in Free Exercise cases even outside the unemployment compensation arena.” (citing *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993))).

This Court’s decision in *Freedom Baptist Church* has been cited favorably by various other federal and state courts in the church zoning context. For example, in *Cottonwood Christian Center v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203, 1222 (C.D. Cal. 2002), the court adopted the language quoted above as its own. It further explained why land use laws were not systems of individualized assessments:

Defendants’ land-use decisions here are not generally applicable laws. Just like the historical landmarking decisions at issue in *First Covenant Church of Seattle*, the City’s refusal to grant Cottonwood’s application for a CUP “invite[s] individualized assessments of the subject property and the owner’s use of such property, and contain mechanisms for individualized exceptions.” 840 P.2d at 181. Even the Redevelopment Agency’s Resolution of Necessity and Defendants’ efforts to condemn the land are individualized assessments.

*Id.* at 1222-23. The same language was again quoted verbatim in *The Greater Bible Way Temple of Jackson v. City of Jackson*, Civ. No. 01-003614, slip op. at 2 (Jackson Cy. Feb. 23, 2003) (“There

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<sup>15</sup> Although a conclusion that land use regulation involves individualized assessments is inevitable, the burden is on the Defendant to prove otherwise. *See Fifth Ave. Presbyterian Church v. City of New York*, 293 F. 3d 570, 576 (2d Cir. 2002) (“[T]he City has not sufficiently shown the existence of a relevant law or policy that is neutral and of general applicability, . . .”).

is no question that the City of Jackson’s review of Plaintiff’s request for rezoning was an individualized assessment.”) (attached as Exhibit “I”). *See also Grace United Methodist Church v. City of Cheyenne*, 235 F. Supp. 2d 1186, 1192 (D. Wyo. 2002) (recognizing *Freedom Baptist Church’s* holding and presuming RLUIPA’s constitutionality); *Ventura Cy. Christian High School v. City of San Buenaventura*, 233 F. Supp. 2d 1241, 1246 (C.D. Cal. 2002) (recognizing *Freedom Baptist Church’s* holding that Section 2(b) of RLUIPA codifies existing Supreme Court decisions under the Free Exercise Clause).

The District of Maryland held that enforcement of a historic preservation ordinance was not neutral and generally applicable:

Clearly, Cumberland’s Historic Preservation Ordinance is significantly different from the “across-the-board criminal prohibition on a particular form of conduct” sustained in *Smith II*. Rather, like the unemployment compensation programs at issue in *Sherbert, Thomas* and *Hobbie*, the ordinance “has in place a system of individual exemptions.” *Smith II*, 494 U.S. at 884, 110 S.Ct. at 1603. . . . *Smith II* recognized that where the government enacts a system of exemptions, and thereby acknowledges that its interest in enforcement is not paramount, then the government “may not refuse to extend that system [of exemptions] to cases of ‘religious hardship’ without compelling reason.” 494 U.S. at 884, 110 S.Ct. at 1603 (quoting *Bowen v. Roy*, 476 U.S. 693, 708 (1986)). Accordingly, the City’s zoning regulation is not entitled to enforcement under the principles set forth in *Smith II*. As a “law restrictive of religious practice,” the City of Cumberland’s Historic Preservation Ordinance must instead “‘advance interests of the highest order’ and be narrowly tailored in pursuit of those interests.” *Church of Lukumi Babalu Aye*, 508 U.S. at 546.

*Keeler v. Mayor & City of Cumberland*, 940 F. Supp. 879, 886 (D. Md. 1996) (emphasis added).

And even more recently, the District of Hawaii agreed:

It is also apparent, then, that (1) Haw. Rev. Stat. § 205-6, which provides for special use permits for “unusual and reasonable” uses, and (2) Haw. Admin. R. § 15-15-95(b), which defines “unusual and reasonable,” allow for exemptions from the permitted uses in Haw. Rev. Stat. § 205-4.5 on an individualized basis. The provisions are a system of “individualized exemptions” to which strict scrutiny applies. *Smith*, 494 U.S. at 884; *Hialeah*, 508 U.S. at 537. Maui County may not deny a special use permit to Plaintiffs to operate a church if doing so imposes a “substantial burden” on Plaintiffs’ free exercise of

religion, unless the County demonstrates a compelling interest and denying the permit would be the least restrictive means of reaching that goal.

Regardless of RLUIPA, then, the substantive test before the Court is strict scrutiny. Has the County's denial of the special use permit "substantially burdened" Plaintiffs' free exercise of religion? If so, has the County demonstrated a "compelling" interest and that the denial is the "least restrictive means" for meeting that interest?

*Hale O Kaula v. Maui Planning Comm'n*, 229 F. Supp. 2d 1056, 1073 (D. Haw. 2002) (emphasis added).<sup>16</sup> Several state courts have also agreed. *See First Covenant Church v. Seattle*, 840 P.2d 174, 218 (Wash. 1992) ("City's preservation ordinances . . . are not neutral and generally applicable."); *Korean Buddhist Dae Won Sa Temple of Hawaii v. Sullivan*, 953 P.2d 1315, 1345 n.31 (Haw. 1998) ("In the case at bar, the City's variance law clearly creates a 'system of individualized exemptions' from the general zoning law.").

Several other courts have held that *merely having to apply* for a land use permit does not impose a substantial burden, the *denial* of such a permit could trigger strict scrutiny review. In *Tran v. Gwinn*, 554 S.E.2d 63 (Va. 2001), the Virginia Supreme Court held that "[t]he procedure requiring review by government officials on a case-by-case basis for a grant of a special use permit may support a challenge based on a specific application of the special use permit requirement, *see, e.g., Islamic Center, . . .*". *Id.* at 68 (footnote omitted). Likewise, the Washington Supreme Court held that the denial of a land use permit is subject to strict scrutiny. *Open Door Baptist Church v.*

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<sup>16</sup>*See also Cam v. Marion Cy.*, 987 F. Supp. 854, 861-62 (D. Or. 1997) (holding that a zoning scheme was not neutral and generally applicable); *Alpine Christian Fellowship v. County Comm'rs of Pitkin Cy.*, 870 F. Supp. 991 (D. Colo. 1994) ("To justify imposing such a burden on religion, the County must show some 'compelling state interest.' Because this is an individualized question, the state interests which justify zoning codes in general are not applicable. The more narrow focus here is whether the reasons given for denial of this special permit application can be characterized as compelling governmental interests.").

*Clark Cy.*, 995 P.2d 33, 52 (Wash. 2000) (“Precedent makes it clear that *closure* of a church would require a compelling state interest.” (citation omitted)).

There is a fundamental difference between a challenge to the existence of an ordinance that requires the landowner to apply for a variance or a permit, and a challenge to the denial of that permit, once the ordinance is applied. *See, e.g., Tran*, at 581-82 (“The instances in which a zoning ordinance was found to impermissibly regulate religious conduct in a manner inconsistent with free exercise requirements can be distinguished. Those instances involved the constitutionality of a zoning ordinance as applied. *See Area Plan Comm’n of Evansville and Vanderbilt Cy. v. Wilson*, 701 N.E.2d 856 (Ind. App. 1998) (“Furthermore, we have previously held that a zoning board’s denial of a special permit will be subject to strict review.”); *Elsinore Christian Center v. City of Lake Elsinore*, Civ. No. 01-4842, slip op. at 24 (C.D. Cal. July 11, 2001) (holding that “[t]he zoning ordinance provides for individualized assessments of church uses in C-1 zones.”).

Nevertheless, Abington Township continues to grasp onto the notion that *religious hostility* must be a motivating factor for a law to trigger strict scrutiny under the Free Exercise Clause. It argues that “if the object of the law is to infringe upon or restrict certain practices because of their religious motivation, then the law is not neutral.” Def. Mem. at 12. The Congregation has already explained how the Township’s laws and their application are not “neutral,” *see supra* Section II.A.1, there is the separate question of whether such laws are “generally applicable” or instead involve “individualized assessments.” The laws at issue in *Sherbert, Thomas*, and *Hobbie* certainly did not “infringe upon or restrict certain practices because of their religious motivation,” yet the *Smith* Court recognized their continued vitality, even as it distinguished them as “individualized assessments” cases.

In *Smith*, the use of peyote was forbidden for everyone. Unlike here, there were no procedures available for a “variance” or similarly discretionary exception in *Smith’s* controlled substance law, and thus it was “generally applicable.” *See Smith*, 494 U.S. at 876 (recognizing that the Oregon statute “‘makes no exception for the sacramental use’ of the drug” (quoting *Smith*, 763 P.2d 146, 148 (Ore. 1988))). By contrast, Abington Township’s Zoning Ordinance does make such exceptions.

The Township then resurrects the tired argument that if this Court were to apply common legal principles employed time and time again by state and federal courts across the Nation in such cases, then “all religious land owners may be laws unto themselves” and that “mere religious identity of the property owner lifts all land use burdens.” Defs. Mem. at 14. This Court need not be alarmed by such fears; places of worship remain subject to the vast majority of land use regulations—only those laws (or their application) that discriminate against them or substantially burden their religious exercise are subject to strict scrutiny. Even then, the State can justify such actions if they demonstrate a compelling governmental interest.

Accordingly, because the Special Use Permit process is extremely discretionary, fact-specific and involves individualized assessments, strict scrutiny is applicable to Defendant’s actions.

**Hybrid Rights.** Similarly, the *Smith* Court distinguished still other Free Exercise cases where it applied strict scrutiny even to neutral and generally applicable laws burdening religious exercise, on the grounds that those cases involved a “hybrid situation” in which the Free Exercise claims were asserted “in conjunction with other constitutional protections, such as freedom of speech and of the press, or the right of parents . . . to direct the education of their children . . . . And it is easy to envision a case in which a challenge on freedom of association grounds would likewise be

reinforced by free exercise concerns.” *Smith*, 494 U.S. at 881-82. There, too, strict scrutiny still applies to substantial burdens. *See Fraternal Order of Police*, 170 F.3d at 363 (acknowledging but not reaching “hybrid” free speech / free exercise argument).

Other courts have applied this doctrine in the church zoning context. *See First United Methodist Church of Seattle v. Hearing Examiner for Seattle Landmarks Pres. Bd.*, 916 P.2d 374 (Wash. 1996) (free exercise and free speech); *First Covenant Church of Seattle*, 840 P.2d 174 (free exercise and free speech); *Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464, 473 (8th Cir. 1991) (“Our reversal of the summary judgment orders [on the Church’s free speech, freedom of association, and equal protection claims] breathes life back into the Church’s ‘hybrid rights’ claim; thus, the district court should consider this claim on remand.”). In *First Covenant Church*, *supra*, the Washington Supreme Court determined that a church challenging Seattle’s Landmarks Preservation Ordinance presented such a hybrid situation. There, the church’s claim was “hybrid” because the church building was used to “express Christian belief and message.” The other constitutional rights violated by Defendant here – property rights and the right to freedom of expression and freedom of association – satisfy this requirement. Plaintiff’s claim thus involves “hybrid rights” triggering strict scrutiny.

**b. The Township’s Ordinance and its application here substantially burden the Congregation’s religious exercise**

Defendants’ laws and actions have imposed a substantial burden on the religious exercise of the Congregation. Denying Plaintiffs a place of worship strikes at the heart of their religious exercise. The reasons for the Congregation’s need to use this property as a place of worship are numerous.

1. *Absence of a permanent home continues to harm the Congregation.*

A *permanent* physical space is critical for the Congregation's religious mission. See Rabbi Holin Decl. ¶ 4 (quoting "'Let them make Me a sanctuary that I may dwell among them.' Exodus 25:8"). A synagogue is defined by its home. *Id.* ¶ 5 ("A synagogue is known by its place of worship. That place is defined by a sanctuary in which there must be an ark, a *Torah* scroll, and an eternal light. The word for 'place' in Hebrew is *makome*, which is also one of the Names of God in the Hebrew tradition."). Not having a permanent home has been a severe disruption in the Congregation's religious activities. *Id.* ¶ 6 (Congregation currently runs the risk that "such services or classes will need to be canceled or rescheduled"); Sloviter Decl. ¶ 20 (Congregation is "unable to properly coordinate and participate in the various social action programs that are so important to the larger community"). Its activities continue to be conducted at various locations. Rabbi Holin Decl. ¶ 6 ("Currently, those landlords are Gratz College, where our religious services are held, and Congregation Melrose-B'nai Israel, where our religious school classes are conducted."); Sloviter Decl. ¶ 13-15 ("Kol Ami conducts committee meetings and adult religious education classes at the homes of various of its members[,] conducts High Holy Day services at the Keswick Theater (a multi-purpose performing arts center in Glenside, Pennsylvania) on the Jewish High Holy Days of Rosh Hashanah and Yom Kippur[, and] leases a gymnasium from the Abington Friends School in order to gather for a congregational *Seder* in the observance of Passover. Meetings with Kol Ami's Rabbi are held at various locations, including the Rabbi's home in Upper Dublin Township.").

2. *Absence of a permanent home threatens irreplaceable sacred items.*

The Congregation's synagogue must also house the Congregation's ark, Torah scroll and eternal light. Rabbi Holin Decl. The absence of a permanent physical home, and in particular a permanent sanctuary with a fixed ark for the Congregation's 350-year-old *Torah*, which is used for every holiday observance, the High Holy Day observances, every *Bar/Bat Mitzvah* and Confirmation, further burdens the Congregation in its religious exercises:

Because we do not have a permanent physical home for Kol Ami, and hence, no sanctuary with an ark to keep our *Torah* safe, it is necessary that our *Torah* be kept at either my home, particularly if I am teaching a *Bar/Bat Mitzvah* or Confirmation student to read from the *Torah*, or at David Sloviter's house. David Sloviter or I must then transport the *Torah* where and when needed. Although we treat the *Torah* with the utmost care and respect, by necessity it must travel, with all the attendant risks of accident and injury.

Should a *Torah* become damaged beyond repair – even if only a small portion remains irreparable – the entire *Torah* must be treated as desecrated and disposed of in accordance with Jewish law and buried. Although I cannot quantify the risk of damage to our *Torah* because we do not have a permanent home, common sense dictates that it is greater than zero. To survive the Holocaust, but not Twenty-first Century American roads, would be among the gravest of ironies and a tragedy.

Rabbi Holin Decl. ¶¶ 18-19. *See also* Sloviter Decl. ¶ 17.

3. *The beliefs of this Congregation require it to locate in a residential community.*

The Congregation believes that it must locate in a residential area, not a business or industrial district:

We are eager to have a spiritual home of our own in a residential community because everything that we teach our children and our adults emphasizes the importance of involvement and service to the community. The *Mishna* or Oral Law handed down by our great rabbinic forebearers in the *Pirkei Avot*, or Ethics of the Fathers, commands: "Do not separate yourself from the community," *Pirkei Avot* 2.4; and warns that "If I am not for myself, who is for me? And if I am only for myself, what am I?" *Pirkei Avot* 1.14. Our worship services consistently reinforce this philosophy

of service to the community: “God, You have made each of us unique, and formed us to be united in one family of life.” *Gates of Prayer*, 1975, p. 187.

Synagogues are found in residential communities because of the correlation between what is taught in the sanctuary and what is expressed outside its walls. Synagogues are “anchoring institutions”: they provide stability, inspiration and hope. Their presence confers the unmistakable message that religion can enhance daily life: where we meet, where we work, and especially where we live. Religion should not be invisible in the neighborhoods where children go to school and where people congregate. A congregation that expresses a willingness to meet with its neighbors, as we have done, can be a tremendous asset to the neighborhood and the larger community.

Rabbi Holin Decl. ¶¶ 8-9.

4. *Absence of a permanent home precludes or severely limits certain forms of religious observance and instruction.*

Other religious exercises of the Congregation are burdened: “Kol Ami does not have a location from which religious books and other religious information or congregational information can be gathered or obtained by its congregants.” Sloviter Decl. ¶ 16. The Congregation is also unable to provide grief counseling, adequate access to the Rabbi, to tutors and religious supplies. *Id.* ¶ 17. “[T]here is no central and consistent location where members may routinely obtain information or from where the leadership can promote the congregation’s activities.” *Id.* ¶ 19. Prohibiting the Congregation from using the Property creates a number of other burdens on their religious exercise. *Id.* ¶¶ 21-25.

Religious services are threatened by disruption because of the lack of the Congregation’s own home:

We currently hold our regular Sabbath or *Shabbat* services, as well as holy day services, at Gratz College. All dates must be cleared on their calendar, but this is not always secure. While we had reserved the Katz Chapel at Gratz College to hold last year’s Confirmation-*Shavuot* service (Friday, June 9, 2000), upon arriving there we learned that a dance recital

would be taking place across the hall at the same time. The noise would have been intrusive to our worship, and so we had to suddenly move upstairs to hold the service in the library. The chapel, with its fixed ark and eternal light, was the appropriate place for the service, not the library that temporarily became a worship space. The Confirmands and their families and friends were dismayed by the last minute change. This is just one example of the uncertainty engendered by the lack of our own permanent spiritual home.

Rabbi Holin Decl. ¶ 7.

Moreover, “[d]ue to the fact that Kol Ami does not have a permanent home, it is unable to provide certain services to its members that are a standard part of the life of all congregations, including but not limited to: grief counseling, routine and easy access to the Rabbi, routine and easy access to tutors and other special educational services, and access to religious books and supplies.” *Id.* ¶ 17. “[T]here is no central and consistent location where members may routinely obtain information or from where the leadership can promote the congregation’s activities.” *Id.* ¶ 19.

The Third Circuit has acknowledged that denying individuals the ability to worship together as a congregation – in the manner that their religion dictates – constitutes a substantial burden on religion: “[A]n opportunity to worship as a congregation . . . may be a basic religious experience and, therefore, a fundamental exercise of religion by a bona fide religious group.” *Small v. Lehman*, 98 F.3d 762, 767-68 (3d Cir. 1996) (footnote omitted, emphasis added). *See also Brown v. Borough of Mahaffey*, 35 F.3d 846 (3d Cir. 1994) (borough impeded church’s ability to hold tent revival meetings in baseball park). As with the plaintiffs in *Small*, Congregation Kol Ami’s ability to engage in congregational worship in a manner that suits their ideological needs is being denied by Defendants. The Congregation’s inability to use its Property as a permanent, centralized, community-based synagogue similarly burdens its religious exercise. *See* Rabbi Holin Decl. ¶¶ 4-6, 8-9, 18-22; Sloviter Decl. ¶¶ 16-27. This sentiment is best described by Rabbi Holin:

Every day that we go without a permanent spiritual home is a day that our Congregants are unable to fully worship, study and/or develop a true sense of the special place that our own sanctuary would offer them: a sense of awe, *the* place to which they can point to with pride for themselves and their children as Congregation Kol Ami's spiritual home to which they can commit themselves for the future. Our nomadic existence – services in the chapel, auditorium or library of Gratz College; meetings and adult education classes in private homes; *Bar/Bat Mitzvah* study with the rabbi at his home; religious school classes at a Conservative synagogue – must end in favor of a place with our own sanctuary and classrooms to which our members will point with pride as truly being Congregation Kol Ami.

Rabbi Holin Decl. ¶ 22.

Defendants response to Plaintiffs' substantial burden claim primarily with a two-page long footnote listing a number of cases where a substantial burden on religious exercise was held not to exist. *See* Defs. Mem. at 18-19 n.4. Out of the forty-one cases mentioned, only *three* relate to the application of land use laws to religious institutions. Half of them are prisoner rights cases, and the remainder involve everything from bankruptcy cases to public school litigation.

Furthermore, none of the three relevant cases are even applicable to the case at bar. *International Church of the Foursquare Gospel v. City of Chicago Heights*, 955 F. Supp. 878 (N.D. Ill. 1996), was simply about a church that sought "cheap" property. "Expense," the court held, was not a substantial burden. *Id.* at 880 ("Additional expense, at least so long as it is not an inflated expense not imposed upon most landowners, is not a substantial burden within the meaning of the RFRA or in the context of the First Amendment."). *Daytona Rescue Mission, Inc. v. City of Daytona Beach*, 885 F. Supp. 1554 (M.D. Fla. 1995), held that the requirement of a permit itself was not a substantial burden. *See id.* at 1560 ("DRM and Varga argue that their exercise of religion is substantially burdened because its church is not permitted anywhere within the City without first receiving approval, and thus, it is denied the opportunity to locate anywhere within the City. The court finds that the City code does not substantially burden DRM and Varga's free exercise of

religion.”). And *Germantown Seventh Day Adventist Church v. City of Philadelphia*, 1994 WL 470191 (E.D. Pa. 1994), involved only a parking space requirement that the plaintiff had challenged as unconstitutional. *See id.* at \*2 (noting that challenged “section provides that ‘one parking space per 1,000 square feet of gross floor area of the building’ is required for ‘non- residential structures’”).

Rather than respond in kind with an equally lengthy footnote listing cases where substantial burdens *have* been found, Plaintiffs rely on the wealth of authority demonstrating that *land use laws* can – and have – substantially burdened religious exercise.

In *Cottonwood Christian Center*, *supra*, (which relied heavily on *Freedom Baptist Church*) the court held the obvious: that being unable to use specific property to build a new church – regardless of the fact that it had existing (but inadequate) facilities – is a substantial burden on religious exercise.

Defendants argue that the “substantial burden” test should be narrowly construed so as to only affect those activities by the government that coerce an individual into an activity prohibited by his religion. By that rubric, Defendants contend that preventing Cottonwood from building a church would not substantially burden its religious exercise.

That definition of “substantial burden” is insufficient. Preventing a church from building a worship site fundamentally inhibits its ability to practice its religion. *Churches are central to the religious exercise of most religions. If Cottonwood could not build a church, it could not exist.*

218 F. Supp. 2d at 1226. There is no relevant distinction between the facts in *Cottonwood* and those in the case at bar. Both religious institutions used existing facilities. Both facilities were inadequate for their religious worship purposes. Both had purchased new land for its place of worship. And, in both cases, the government applied its land use laws in a manner that prevented that use.

The Sixth Circuit agrees. *See DiLaura v. Ann Arbor Charter Tp.*, 30 Fed. Appx. 501 (6<sup>th</sup> Cir. 2002) (holding that township substantially burdened religious organization’s religious exercise by denying a variance for its use of specific property as a religious retreat).

The question then becomes whether gatherings of individuals for the purposes of prayer (the activity at issue) is a use of land constituting a religious exercise that is substantially burdened, under RLUIPA, by a zoning ordinance that prevents such gatherings. Recent federal precedent answers in the affirmative. [*Murphy*.] The *Murphy* court found that the application of the zoning ordinance to prohibit prayer meetings violated RLUIPA, despite the fact that neighborhood aesthetics and safety were at stake, by placing a substantial burden on free exercise rights in the use of land protected by RLUIPA.

*Id.* at 509. As here, the specific relief denied by the township was a variance. *Id.* at 503. The court did not even suggest that the fact that there might have been other “houses” in Ann Arbor where the religious retreat could have been located was relevant to its decision.

The case relied upon by *DiLaura* — *Murphy v. Zoning Comm’n of Town of New Milford*, 148 F. Supp. 2d 173 (D. Conn. 2001) (granting preliminary injunction under RLUIPA) — holds likewise. There, the town sought to prevent homeowners’ use of specific property for prayer meetings. Such enforcement, the court held, substantially burdened the plaintiffs’ religious exercise:

Moreover, the defendants actions have imposed a substantial burden directly on plaintiffs. Mr. Murphy testified that the prayer group sessions were an important part of his life because he believed that God and prayer saved his life, and the prayer group meetings helped the participants and others who were having difficulties in their lives. . . . Patrick Murphy, plaintiffs’ son and one of the organizers of the meetings, testified that he did not want the prayer group meetings to be limited to twenty-five people or fewer because part of the purpose of the meetings was to help people in need and, if a twenty-sixth person needed the help of the prayer group, he did not want to turn that person away. . . . Patrick Murphy stated that this limitation would affect the members of the group because it would defeat “the whole intent of our prayer group . . . .”

148 F. Supp. 2d at 189. As the Declarations of Rabbi Holin and David Sloviter clearly demonstrate, the Congregation has similarly been unable to engage in certain practices motivated by its religious

beliefs as a direct result of the Township's actions. *See supra*. In addition, due to the fact that the Congregation lacks a synagogue:

a number of its members have resigned to join congregations with a permanent physical home or synagogue, particularly those members who wished to have their child's *Bar* or *Bat Mitzvah* ceremony take place in a more conducive setting than the auditorium at Gratz College and particularly in Congregation Kol Ami's own spiritual home. There are members who are very concerned that the *Bar* or *Bat Mitzvah* of their child be held in a suitably religious environment. Due to the fact that Kol Ami does not have a permanent home, several members have left Kol Ami because they are not confident that we will have such a facility in time for this important event in their family's life. They have reluctantly found it necessary to join elsewhere in order to participate in the program offered by other congregations.

Sloviter Decl. ¶ 18. *See also id.* ¶ 24 (“Because of the Abington Zoning Hearing Board's decision to reject Kol Ami's application, a few members have rescinded their commitments to contribute to our capital campaign, including one donor who cancelled a \$100,000 gift.”).

The Second Circuit Court of Appeals recently held that preventing a church from allowing homeless people to sleep on its outdoor property substantially burdens the church's religious exercise:

We agree with the District Court that on the present record, the Church has demonstrated a likelihood of success in establishing that its provision of outdoor sleeping space for the homeless effectuates a sincerely held religious belief and therefore is protected under the Free Exercise Clause. *Cf. Stuart Circle Parish v. Bd. of Zoning Appeals of the City of Richmond*, 946 F. Supp. 1225, 1236 (E.D.Va. 1996); *Western Presbyterian Church v. Bd. of Zoning Adjustment of the District of Columbia*, 862 F.Supp. 538, 544-46 (D.D.C. 1994).

*Fifth Ave. Presbyterian Church v. City of New York*, 293 F.3d 570, 575 (2d Cir. 2002). Again, the fact that the Church could have sheltered the homeless elsewhere did not even enter the court's consideration.

Adopting the reasoning of *Freedom Baptist Church* and *Cottonwood Christian Center*, a recent Michigan state case held that the denial of a request for rezoning substantially burdened a church's religious exercise in a set of facts similar to the case at bar, even though the proposed activity was already taking place in other locations:

Part of Plaintiff's religious mission is to provide housing for the disabled and elderly. . . . [T]he Defendant notes that the Plaintiff already is involved in providing housing and that is being conducted at many locations in the State of Michigan. . . .

However, Plaintiff notes that the Church provides meals, religious activities, social activities, and related services such as a religious bookstore. There are obvious financial, logistic and organizational advantages to having Church sponsored apartments in close proximity to the main Church building. . . .

On these uncontested facts I find that the Defendants zoning decision has substantially burdened this Church's free exercise of their religious beliefs. They have not completely prevented the exercise of their religious beliefs because obviously this Church has already provided housing that is not adjacent to its Church. However, this is not a small or minimal burden, it is a substantial burden."

*The Greater Bible Way Temple of Jackson v. City of Jackson*, Civ. No. 01-3614, slip op. at 3 (Jackson Cy. Feb. 25, 2003) (emphasis added) (attached as Exhibit "I"). *See also Freedom Baptist Church*, 204 F. Supp. 2d at 866 ("In essence, plaintiffs contend that the zoning condition on their lease of property in Middletown, and associated parking requirements, constitute a substantial burden on them, . . . . On a motion to dismiss, where we read a complaint liberally in favor of the plaintiff, we will accept this reading of the controversy, . . . ." (footnote omitted))

Lest there be any doubt, the text of RLUIPA itself also admits of such an interpretation; it states explicitly that "[t]he use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose." 42 U.S.C. § 2000cc-5(7)(B).

Finally, several Courts of Appeals have addressed the issue of burdens that land use laws can inflict on religious exercise in the context of Establishment Clause challenges to statutes and ordinances that *relieve* such burdens (like RLUIPA does). In unanimously upholding such accommodations, these courts recognized that if government were to prohibit a private party from building or improving its property as a place of worship or other religious use, it would be burdening that religious exercise. *See Ehlers-Renzi v. Connelly School of the Holy Child, Inc.*, 224 F.3d 283, 291 (4<sup>th</sup> Cir. 2000) (“And necessary to the fulfillment of this mission is the existence of facilities which Connelly School deems adequate to carry on its religious instruction.”); *Boyajian v. Gatzunis*, 212 F.3d 1, 8 (1<sup>st</sup> Cir. 2000) (“[T]he state’s decision to give religion an assist in the local land-use planning process is consistent with the Supreme Court’s holding in *Amos* that legislation isolating religious groups for special treatment is permissible when done for the ‘proper purpose’ of alleviating a *burden on the exercise of religion*.”) (emphasis added); *Cohen v. City of Des Plaines*, 8 F.3d 484, 492 (7<sup>th</sup> Cir. 1993) (“By exempting churches (which themselves do not require a special use permit to operate) from the special use requirement in the operation of nursery schools and day care centers, the city has removed a *burden to the free exercise of religion*.”) (emphasis added).

The Township also cites *Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464 (8<sup>th</sup> Cir. 1991), *Lakewood, Ohio Congregation of Jehovah’s Witnesses, Inc v. City of Lakewood, Ohio*, 699 F.2d 303 (6<sup>th</sup> Cir. 1983), and *C.L.U.B. v. City of Chicago*, 2001 WL 321056 (N.D. Ill.). The reference by the Township to *Cornerstone Bible Church* is surprising, since the Eighth Circuit held that strict scrutiny is applicable to the exclusion of places of worship from certain zoning districts

because such exclusion implicates “hybrid rights.”<sup>17</sup> 948 F.2d at 473. As in *International Church of the Foursquare Gospel, supra*, the issue in the *Lakewood* case was whether a financial interest rose to the level of a substantial burden. *Id.* at 307 (“In short, the burdens of the ordinance are the *increased cost of purchasing land* and the violation of the Congregation’s aesthetic senses, if the Congregation chooses to build a new church in Lakewood.”) (emphasis added). And like in *Daytona Rescue Mission, supra*, the *C.L.U.B.* litigation involved only a challenge to an ordinance that required a special use permit for places of worship. Having to go through the SUP process itself, that court held, was not a substantial burden. *Id.* at 914-15.<sup>18</sup> All of these cases are inapposite.

Defendants’ final argument is to assert that there are “ample opportunities to locate” in any existing district that permits places of worship. Def. Mem. at 20-21. This is neither relevant nor true. As an initial matter, Plaintiffs need not prove that this property is the *only* possible location for their worship activities. In *Schad v. Borough of Mount Ephraim*, the Supreme Court held that

[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.

452 U.S. 61, 76-77 (1981); *accord Freedom Baptist Church*. Other courts have adopted this principle in the place of worship/zoning context. In *McCurry v. Tesch*, 738 F.2d 271, 275 (8th Cir. 1984), *cert. den.*, 469 U.S. 1211 (1985), the Eighth Circuit Court of Appeals held that a prohibition

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<sup>17</sup> *Cornerstone Bible Church* did *not* focus on the denial of a permit or variance. 948 F.2d at 467 (“[T]his lawsuit focuses on the City’s exclusion of churches from the central business district (C-3) zone.”).

<sup>18</sup> As counsel for the Township well knows, having filed an brief *amicus curiae* in that case, the *C.L.U.B.* litigation is currently before the Seventh Circuit, where the City of Chicago received a frosty reception before that panel. In recounting the *C.L.U.B.* argument before the Seventh Circuit, the Chicago Tribune recounted that “[Judge] Posner said it was hard to imagine any area where replacing a saloon or club with a church ‘would harm the community in any way.’” *Churches challenge city on zoning law*, CHICAGO TRIBUNE 16 (Jan. 18, 2003).

against operation in residential neighborhoods does create a substantial burden, regardless of the fact that the church could worship elsewhere:

The defendants' argument that these rights would not be burdened by an order restricting the times that the plaintiffs could hold religious services in the church to weekends and Wednesday evenings, because the plaintiffs would be free to congregate and worship elsewhere, misses the mark: "[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 76-77 . . . . This principle applies with particular force to places, such as church buildings, which have a special spiritual significance to the persons who wish to worship there

*Id.* It is as inconsistent with our Nation's First Amendment jurisprudence to tell a church that it suffers no burden on its religious exercise if its members can worship elsewhere as it would be to tell a public school student or public employee that, if the government's policies burdened their religious exercise, there was no substantial burden as long as they could find an alternative school or employment.

Moreover, even if Defendants' argument was legally viable—which it is not—it fails here as a matter of fact. "Since 1997, Kol Ami has been searching for a property in either Abington Township or Cheltenham Township that it could purchase for use as its permanent home or synagogue." Sloviter Decl. ¶ 5. In its property search, "[t]he Congregation considered all the properties that it could identify in Abington Township and Cheltenham Township that met its minimum acreage requirements." *Id.* ¶ 8. The Congregation found that "[t]he only property that would adequately accommodate the Congregation's religious exercise was the Villa Nazareth property, located at 1908 Robert Road, Abington, Pennsylvania." *Id.* ¶ 9. The Declaration of Yael Milbert also demonstrates that the Property is the only suitable location for the Congregation's synagogue in Abington Township. Milbert Decl. ¶¶ 5-7. Defendants' argument must fail.

**3. Summary judgment should be denied on Plaintiffs' claim that Abington's Ordinance fails strict scrutiny**

Although it is unnecessary for the resolution of this Motion – since the Township does not claim that it is entitled to summary judgment on the questions of whether it has any compelling governmental interest, or whether the burden imposed on the Congregation is the least restrictive means of achieving that interest – the Congregation will briefly address the fact that no such interest exists.

**a. The Township lacks any rational – much less compelling – basis for the relevant provisions of its Ordinance and, by its own admission, for their application in this case to burden the Congregation's religious exercise**

Abington Township forbids places of worship in *every* residential district within its borders. As discussed in greater detail in our June 13, 2001 motion for partial summary judgment, and in a similar future motion, such a total ban serves no rational interest. Moreover, as the Congregation intends to demonstrate at the appropriate juncture, the various interests Defendants have asserted—mainly traffic and aesthetics—fall short of “compelling” as a matter of law.<sup>19</sup> However,

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<sup>19</sup> The Supreme Court has described the “compelling government interests” that may justify burdens on religious exercise as “paramount interests,” *Sherbert*, 374 U.S. at 406; those “of the highest order,” *Lukumi*, 508 U.S. at 546. In the land use context, these interests have been described as those in preventing “a clear and present, grave and immediate danger to public health, peace and welfare,” such as fire safety and occupancy limits. *See, e.g., Antrim Faith Baptist Church v. Commonwealth Dep't of Labor & Industry*, 460 A.2d 1228, 1230 (Pa. Cmwlth. 1983) (“[J]ust as the state is entitled to prevent church buildings from being constructed too flimsily over the heads of the worshipers, the state is entitled to see to it that fire-safety precautions are taken”). More specifically, courts routinely reject the claim that “compelling governmental interests” include the interest in avoiding increases in traffic and parking in residential areas. *See* 2001 Opinion, Findings of Fact, ¶¶ 182, 188, 191, Exhibit E, hereto; *see, e.g., Love Church v. Evanston*, 671 F. Supp. 515, 519 (N.D. Ill. 1987), *vacated based on standing*, 896 F.2d 1082 (7th Cir. 1990) (“While traffic concerns are legitimate, we could hardly call them compelling.”); *American Friends of Soc’y of St.*

(continued...)

the most recent Opinion and Order of the Abington Township Zoning Hearing Board regarding the Congregation’s application for a Special Exception erases any doubt that it lacks any rational or compelling interest as a matter of fact. Compare the Township attorneys’ arguments with the Township’s own admissions:

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(...continued)

***Pius v. Schwab***, 417 N.Y.S.2d 991, 993 (N.Y.A.D. 1979) (“[C]onsiderations of the surrounding area and potential traffic hazards . . . are outweighed by the constitutional prohibition against the abridgement of the free exercise of religion and by the public benefit and welfare which is itself an attribute of religious worship in a community.”); ***State ex rel. Tampa Company of Jehovah’s Witnesses, etc. v. Tampa***, 48 So. 2d 78, 79 (Fla. 1950) (“The contention that people congregating for religious purposes cause such congestion as to create a traffic hazard has very little in substance to support it. Religious services are normally for brief periods two or three days in the week and this at hours when traffic is at its lightest.”). Indeed, creation of an abnormal traffic pattern does not even justify denial of a special exception under Pennsylvania zoning law, unless that traffic “will pose a substantial threat to the health and safety of the community.” ***Orthodox Minyan of Elkins Park v. Cheltenham Twp. Zoning Hearing Bd.***, 552 A.2d 772, 774 (Pa. Cmwlth. 1989).

Nor are aesthetic considerations—such as avoiding any increase in noise and light or reduction of “residential character”—compelling interests. See 2001 Bd. Op. FF ¶¶ 182, 189, 190; see, e.g., ***Open Door Baptist Church v. Clark County***, 995 P.2d 33, 41 (Wash. 2000) (furthering “aesthetic and cultural interests” is not a compelling interest); ***Alpine Christian Fellowship v. County Comm’rs***, 870 F. Supp. 991, 994 (D. Colo. 1994) (rejecting asserted interest in avoiding additional “noise impacts” of religious school); ***Society of Jesus v. Boston Landmarks Comm.***, 564 N.E. 2d 571, 574 (Mass. 1990) (“The government interest in historic preservation, though worthy, is not sufficiently compelling to justify restraints on the free exercise of religion, a right of primary importance.”). See also ***Congregation Comm. v. City Council of Haltom City***, 287 S.W.2d 700, 704-05 (Tex. Civ. App. 1956) (“Neither is mere inconvenience to neighbors . . . a valid reason to deny a church the right to exist in a residential district. It is hard to visualize a church being constructed in a residential district without inconveniencing someone. To restrict churches to areas where no one will be inconvenienced would be, in effect, excluding churches from residential districts.”).

Nor is the maintenance of property values. See 2001 Bd. Op. FF ¶¶ 183-85. In a case involving proposed land use for religious worship and instruction in an exclusive residential neighborhood, the Supreme Court of Indiana found insufficient the “private interest in protecting property from depreciation . . . and a desire to keep a neighborhood as exclusive as possible,” holding that “the general public interest in the moral and intellectual education of the young far outweighs the private interest affected by any depreciation in neighboring property values.” ***Board of Zoning Appeals v. Schulte***, 172 N.E.2d 39, 44 (Ind. 1961); see ***Greentree at Murray Hill Condo. v. Good Shepherd Episcopal Church***, 550 N.Y.S.2d 981, 989 (1989).

**Defs. Mem. at 43:** Kol Ami’s use “would jeopardize the safety and welfare of the residents in the R1 district . . . .”

**8/15/01 Bd. Op., at 14:** “The Board finds that granting this application will not adversely affect the health, safety and welfare of the community.”

**Defs. Mem. at 43:** Kol Ami’s use would “adversely affect the neighbors’ peaceful enjoyment of their privately owned property.”

**8/15/01 Bd. Op., at 14:** “The Applicant’s proposed use of the Property as a synagogue and religious school will not substantially injure or detract from the use of the surrounding property or from the character of the neighborhood, and is consistent with the Comprehensive Plan.”

The ZHB also found that:

Kol Ami’s proposed use of the property as a synagogue and religious school will not:

- a. overcrowd the land or create an undue concentration of population;
- b. impair an adequate supply of light and air to adjacent property;
- c. increase the danger of fire or otherwise endanger the public policy;
- d. substantially increase the congestion in the public streets or adversely affect Township transportation;
- e. adversely affect or unduly burden public water, sewer, school, police, fire, park or other public facilities; nor
- f. adversely affect in any other manner the public health, safety, morals or general welfare.

. . . .

The Board finds that the Applicant’s proposed use of the Property as a synagogue and religious school is consistent with the spirit, purpose, and intent of the Ordinance.

8/15/01 Bd. Op., at 13-14. Very rarely is a court faced with a circumstance where the government itself admits that the proposed use “will not . . . adversely affect . . . the public health, safety, morals or general welfare” in *any* manner. Clearly, no compelling interest exists to prevent the Congregation’s use.

**b. Even if the Township could show a that the Congregation’s use offended a compelling interest, denying that use entirely is not the least restrictive means of serving that interest**

The Township cannot prove that forbidding the Congregation from using the Property for worship is the “least restrictive means” of furthering any interest. *See State ex re. Lake Drive Baptist Church v. Village of Bayside Bd. Of Trustees*, 108 N.W.2d 288, 300 (Wis. 1961) (concurring opinion) (“The exclusion of churches from residential districts *has no substantial relationship* to the promotion of public health, safety, morals or general welfare.”) (emphasis added); *FOP Newark Lodge No. 12 v. City of Newark*, 170 F.3d at 366 (finding city’s no-beard policy not narrowly tailored to government interest of safety); *Black Hawk v. Commonwealth of Penn.*, 114 F. Supp. 327, 333 (M.D. Pa. 2000) (finding state’s proposed killing of religiously significant bear not narrowly tailored to government interest of avoiding spread of rabies).

Once again, the Township’s own admissions demonstrate that there are other means of achieving any governmental interest. In its August 15, 2001 Opinion and Order, the Zoning Hearing Board outlined twenty-six conditions to be met by the Congregation in order to be granted a Special Exception. These conditions range from limiting the size of the congregation, to the timing of services, to the employment of traffic monitoring personnel, to the types of activities that can take place outdoors. *See also* Sloviter Decl. ¶ 28 (“Kol Ami has been and continues to be ready, willing and able to provide reasonable measures, e.g., traffic monitoring, to address the perceived concerns of the community.”). There is simply no need or reason for the outright ban of the Congregation. Thus, if this Court is unwilling to reject or continue Defendants’ motion as premature,

Plaintiffs have adduced evidence sufficient to create at least a genuine issue of material fact on their claim for violations of the Free Exercise Clause.

**B. Genuine Issues of Material Fact and Incomplete Discovery Preclude Summary Judgment on Count II, Plaintiffs' Claim Under the Pennsylvania Freedom of Conscience Clause**

The federal Constitution establishes certain minimum levels of protection for individual rights below which States may not regulate, but each State has the power to provide broader standards, going beyond the minimum floor of the federal standard.<sup>20</sup> In interpreting the Pennsylvania Constitution, the Supreme Court of Pennsylvania has made clear that a court must “undertake an independent analysis of the Pennsylvania Constitution, each time a provision of that fundamental document is at issue.” *Commonwealth v. Edmunds*, 586 A.2d 887, 894-95 (Pa. 1991).

Defendants assert that the claims made under the Pennsylvania Constitution should be dismissed for failure to state a claim and that they are therefore entitled to judgment as a matter of law. *See* Defs. Mem. at 14-16.<sup>21</sup> Defendants point to no failure by Plaintiffs to produce probative evidence. Even if they had, the evidence Plaintiff has produced in support of the federal constitutional free exercise claim, *see supra*, is more than sufficient to survive a motion for summary judgment on the state constitutional claim as well. *A fortiori*, because the Pennsylvania Constitution is more protective of religious exercise than is the federal Constitution, evidence adduced in favor

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<sup>20</sup> *See, e.g., PruneYard Shopping Center v. Robins*, 447 U.S. 74, 80-82 (1980); *Commonwealth v. Edmunds*, 586 A.2d 887, 894 (Pa. 1991); *Commonwealth v. Cauffman*, 662 A.2d 1050, 1058 (Pa. 1995). The Pennsylvania Supreme Court has recognized that a state’s independent analysis of its constitution reflects the intention of this country’s founders that the states maintain their autonomy. *See Commonwealth v. Edmunds*, 586 A.2d at 894 (citations omitted).

<sup>21</sup> Defendants simply parrot, word for word, their previous motion to dismiss this claim, *see* June 2001 Motion at 17-19, and then add two sentences asserting that, if Plaintiffs have not even asserted a claim, then they are entitled to judgment as a matter of law, *see* Defs. Mem. at 16.

of a federal free exercise claim is more than sufficient to support one under the Pennsylvania Constitution.

Moreover, the standard Defendants set out for stating a constitutional claim under Pennsylvania law is simply incorrect—far from being mandated at the pleading stage, the four-factor analysis set out in *Commonwealth v. Edmunds*, 586 A.2d 887, 895 (Pa. 1991), is simply a helpful framework.<sup>22</sup> But although *Edmunds* four-factor analysis is not mandatory, it is particularly useful in dealing with the free exercise claim because the Pennsylvania Constitution differs so greatly from the federal. Accordingly, the Congregation addresses each factor in turn.

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<sup>22</sup> Defendants incorrectly characterize the case law, asserting that the unpublished decision in *Chantilly Farms v. West Pikeland Twp.*, No. 00-3903, 2001 WL 290645 (E.D. Pa. Mar. 23, 2001), stands for the proposition that litigants must strictly follow a four-part analysis even to state a claim under the Pennsylvania Constitution that can survive a motion to dismiss. Defs. Mem. 14-16. To the contrary, the Supreme Court of Pennsylvania does not require litigants to brief the four *Edmunds* factors in order to preserve a cognizable claim on state constitutional grounds. *Commonwealth v. Edmunds*, 586 A.2d 887 (Pa. 1991) (discussing the factors “as a general rule”); *Commonwealth v. White*, 669 A.2d 896, 899 (Pa. 1995) (holding that the Supreme Court does not “mandat[e] the analysis”); *Commonwealth v. Hayes*, 674 A.2d 677, 680 (Pa. 1996) (describing the analysis as “quite useful,” but “not mandatory”); *Commonwealth v. Crouse*, 729 A.2d 588, 594 (Pa. Super. Ct. 1999) (“Our Supreme Court has stated that *Edmunds* does not require a litigant to brief and analyze the four factors to preserve a cognizable claim on state constitutional grounds.”). In fact, the Pennsylvania Supreme Court has concluded that a lower court “erred” in dismissing a constitutional claim for failure to address the *Edmunds* factors. *Commonwealth v. Franciscus*, 710 A.2d 1112, 1121 (Pa. 1998). The court has also referred to its own analysis as “dicta.” *White*, 669 A.2d at 899. Furthermore, the *Chantilly* court itself notes that the Supreme Court of Pennsylvania has found that “the failure of a litigant to present his state constitutional arguments in the form set forth in *Edmunds* does not constitute a fatal defect.” *Chantilly*, 2001 WL 290645, at \*12 n.9, quoting *Commonwealth v. Swinehart*, 664 A.2d 857, 961 n.6 (Pa. 1995). It is actually the court itself, in ruling on the merits of such a claim, that must follow the format set forth in *Edmunds*. See *Crouse*, 729 A.2d at 594 (“*Edmunds* does require the Court to undertake its four-part analysis when an issue implicates a provision of the Pennsylvania Constitution.”). For these reasons, as well as others mentioned in the text, Defendants are incorrect in asserting that Plaintiff has failed to state claims under Article I, Sections 3, 7, 20 and 26. See Defs. Mem. at 15 n.1.

1) **Text.** The Pennsylvania Constitution Article I, Section 3 states:

All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; no man can of right be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent; no human authority can, in any case whatever, control or interfere with the rights of conscience, and no preference shall ever be given by law to any religious establishments or modes of worship.

PA. CONST. art. I, § 3. These *specific* prohibitions and governmental duties have no counterpart in the vague language of the First Amendment. As other States have held, such an explicit protection against the *interference* with the rights of conscience encompasses much more than a protection against laws that *prohibit* the free exercise of religion.<sup>23</sup> Furthermore, whereas the federal clauses may be (and have been in *Smith*) interpreted as a requirement of *neutrality* towards religion, Pennsylvania’s provisions provide an *affirmative* right to practice religion freely—not just limiting the power of the legislature but addressing rights of individuals. This difference is crucial, for even if a regulation were neutral and generally applicable and were found not to implicate hybrid rights and thus were subject only to rational basis review under *Smith*, it may still infringe upon the “natural and indefeasible right to worship Almighty God according to the dictates of [one’s] own conscience.”

2) **History.** The history of Article I, Section 3 of the Pennsylvania Constitution supports a broader construction of religious liberty than that given to the Free Exercise Clause of the United States

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<sup>23</sup> See, e.g., *Humphrey v. Lane*, 728 N.E.2d 1039, 1044 (Ohio) (“We find the phrase that brooks no ‘interference with the rights of conscience’ to be broader than that which proscribes any law prohibiting free exercise of religion.”), *cert. denied*, *Fink v. Ohio*, 531 U.S. 912 (2000); *State v. Hershberger*, 462 N.W.2d 393, 397 (Minn. 1990) (“[G]overnment actions that many not constitute an outright prohibition on religious practices (thus not violating the first amendment) could nonetheless infringe on or interfere with those practices, violating the Minnesota Constitution.”). See also *State v. Miller*, 549 N.W.2d 235 (Wis. 1996) (construing language like that in Pennsylvania Constitution to require compelling state interest/least restrictive alternative test); *State v. Evans*, 796 P.2d 178 (Kan. 1990) (same).

Constitution by *Smith*. In fact, the Pennsylvania Supreme Court has stated that the Commonwealth, “more than any other sovereignty in history, traces its origins to the principle that the fundamental right of conscience is inviolate.” *Commonwealth v. Eubanks*, 512 A.2d 619, 622 (Pa. 1986) (citing *The Papers of William Penn*, vol. I (Dunn & Dunn, Univ. of Pa. Press)).<sup>24</sup> Unlike some states, *see, e.g.*, HAW. CONST. art. I, § 4, the language in the Commonwealth’s provision, adopted in 1776, is not derived from the federal First Amendment, ratified in 1791. *See* ANSON P. STOKES & LEO PFEFFER, CHURCH AND STATE IN THE UNITED STATES 155 (1964). Pennsylvania courts have recognized that the provision does not mirror the federal Free Exercise Clause,<sup>25</sup> even stating that the federal free exercise “amendment is not nearly as strong as the corresponding provision in the Pennsylvania Constitution.” *Commonwealth v. Bauder*, 145 A.2d 915, 917 (Pa. Super. 1958). Precedent supports the proposition that Article I, Section 3 requires the application of the compelling

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<sup>24</sup> ARLIN M. ADAMS & CHARLES J. EMMERICH, A NATION DEDICATED TO RELIGIOUS LIBERTY 6 (1990) (“The Quaker leader William Penn devoted his life to securing liberty of conscience as a God-given right beyond the dominion of government.”), *quoted in Freethought Society v. Chester County*, 194 F. Supp. 2d 437, 441 n.7 (E.D. Pa. 2002).

<sup>25</sup> Gary S. Gildin, *Coda to William Penn’s Overture: Safeguarding Non-Mainstream Religious Liberty Under the Pennsylvania Constitution*, 4 U. PA. J. CONST. L. 81, 120 (2001) (“[T]he Pennsylvania courts had evaluated challenges to laws of general applicability under article I, section 3 long before 1940, when the Free Exercise Clause was first held applicable to the States. This settled independent jurisprudence repudiates any suggestion that the Pennsylvania courts have interpreted article I, section 3 merely to duplicate protection afforded by the federal Constitution.”) (footnotes omitted).

interest test or comparable scrutiny,<sup>26</sup> and Pennsylvania courts have applied the Commonwealth's Constitution to permit infringement upon religious liberty only in the most dire cases.<sup>27</sup>

**3) Other States.** In response to the *Smith* decision, nearly half of the States have chosen to require a compelling government interest to justify a burden on religious freedom.<sup>28</sup> Even more specifically,

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<sup>26</sup> “While the Pennsylvania courts did not use the compelling interest terminology, they repeatedly stated that only those governmental interests that are ‘paramount’ may constitutionally burden religious exercise. . . . [T]he Pennsylvania courts consistently mandated proof of more than a rational basis before upholding laws of general applicability that conflicted with an individual’s religious convictions.” Gildin, *supra*, at 122.

<sup>27</sup> See, e.g., *Zummo v. Zummo*, 574 A.2d 1130, 1135 (Pa. Super. Ct. 1990) (First Amendment and state equivalents allow government interference with religion “only . . . in support of countervailing interests of the highest order, and then only in the least intrusive manner adequate to safeguard the specific interests identified”); *id.* at 1138-39 (“[P]arental authority in matters of religious upbringing may be encroached upon, only upon a showing of a ‘substantial threat’ of ‘physical or mental harm to the child, or to the public safety, peace, order, or welfare.’” (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 230 (1972))); *In re Cabrera*, 552 A.2d 1114, 1118 (Pa. Super. Ct. 1989) (“The right to practice religion freely does not include the liberty to expose the community or the child to communicable disease or the latter to ill health or death.” (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944))); *Wikoski v. Wikoski*, 513 A.2d 986, 987, 989 (355 Pa. Super. Ct. 1986) (referencing compelling interest/least restrictive means test; applying “a most substantial test” and a “stringent analysis,” but concluding state’s interests were “paramount”).

<sup>28</sup> According to Gildin, *supra*, twenty States have insisted that strict scrutiny apply to neutral laws of general applicability: Eight in legislative enactments. *Id.* at 125-26 & nn. 212-19 (referencing enactments in Rhode Island, Connecticut, Illinois, Florida, South Carolina, Arizona, Texas, and Idaho). One in an amendment to the state constitution. *Id.* at 126 & n.221 (noting an Alabama amendment). And eleven of them in judicial decisions. See *Swanner v. Anchorage Equal Rights Comm’n*, 874 P.2d 274 (Alaska 1994), *cert. denied*, 513 U.S. 979 (1994); *Rupert v. City of Portland*, 605 A.2d 63 (Me. 1992); *State v. Hershberger*, 462 N.W.2d 393 (Minn. 1990); *St. John’s Lutheran Church v. State Comp. Ins. Fund*, 830 P.2d 1271, 252 Mont. 516 (1992); *Humphrey v. Lane*, 728 N.E.2d 1039 (Ohio), *cert. denied*, *Fink v. Ohio*, 531 U.S. 912 (2000); *First Covenant Church of Seattle v. City of Seattle*, 840 P.2d 174 (Wash. 1992); *State v. Miller*, 549 N.W.2d 235 (Wis. 1996); *State v. Evans*, 796 P.2d 178 (Kan. 1990); *Attorney Gen. v. Desilets*, 636 N.E.2d 233 (Mass. 1994); *In re Browning*, 476 S.E.2d 465 (N.C. App. Ct. 1996); *Rourke v. N.Y. State Dep’t of Corr. Servs.*, 603 N.Y.S.2d 647 (N.Y. Sup. Ct. 1993). See also Gildin, *supra*, at 125-26 & nn.200-10 (referencing decisions from Massachusetts, New York, Minnesota, Alaska, Montana, Wisconsin, Washington, Ohio, Main, North Carolina, and Kansas).  
(continued...)

the states whose constitutions contain language similar to that found in the Pennsylvania Constitution's Article I, Section 3, and who have confronted this question generally have required a compelling interest. *See supra*, note [\*\_\*] (citing *Humphrey, Hershberger*, et al.).<sup>29</sup>

**4) Policy.** Prior to 1990, the protections afforded by federal law generally fulfilled the principles underlying Article I. However, because the protections afforded by the federal Constitution were weakened by *Smith*, an independent reading of Pennsylvania's Constitution is necessary to effectuate the goals of Article I, Section 3. *Cf. Edmunds*, 586 A.2d at 901 (“an assessment of various policy considerations, however, only supports our conclusion” that Pennsylvania Constitution sets a high bar for the protection of religious freedom). The reasoning behind *Smith* that federal judges are ill-suited to craft religious exemptions to neutral State laws without exemptions – and behind *Boerne* that Congress cannot force exemptions on the States except where specifically empowered to do so – simply is irrelevant to the religious protections that an *individual State* may choose to provide. Moreover, the preservation of a high standard of review for assertions of infringement on religious liberty furthers the goal of William Penn and others early in our history that this Nation and this Commonwealth would be a place of religious freedom.

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(...continued)

In contrast, only two have concluded the rational basis test applies under their state constitutions as well following *Smith*. *Id.* at 126 & n.222-23 (citing Tennessee and Oregon).

<sup>29</sup> As one court explained:

It was the *Smith* decision that marked the divergence of federal and Ohio protection of religious freedom. Not until *Smith* did the difference in the constitutional clauses become relevant [because this] court has traditionally mirrored federal jurisprudence as to protection of religious freedom . . . follow[ing] federal jurisprudence in enunciating a compelling-state-interest test in Ohio.

*Humphrey*, 728 N.E.2d at 1044 (citation omitted).

In conclusion, to apply *Smith's* test for the Federal Free Exercise Clause to the Pennsylvania Constitution would be to render portions of the text of Article I, Section 3 meaningless. To simply apply a rational basis test in this situation would constitute a wide departure from the text and history of Article I, Section 3 of the Pennsylvania Constitution and an abdication of Pennsylvania's sovereign prerogative to provide broader protections for the fundamental rights of its citizens. The reinterpretation of the First Amendment by the U.S. Supreme Court in 1990 did not, and could not, change this Commonwealth's guarantees of religious freedom. As in *Edmunds*, this Court should "decline to undermine the clear mandate of [the Pennsylvania Constitution's] provisions by slavishly adhering to federal precedent where it diverges" from both history and precedent. *Edmunds*, 586 A.2d at 903.

**C. Genuine Issues of Material Fact and Incomplete Discovery Preclude Summary Judgment on Counts III and IV, Plaintiffs' Claims Under the Federal and Pennsylvania Free Speech Clauses**

Defendants devote only three paragraphs to their argument that plaintiffs' Free Speech and Freedom of Association claims cannot survive their summary judgment motion, claiming simply that they "must be rejected on their face." Defs. Mem. at 42. This flies in the face of countless zoning decisions upholding free speech claims against zoning ordinances.<sup>30</sup> "There is no question that religious discussion and worship are forms of speech and association protected by the first

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<sup>30</sup> See, e.g., *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61 (1981) (holding unconstitutional an ordinance that excluded any "live entertainment," which included nude dancing); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981) (holding that ordinance prohibiting certain types of billboards violated the free speech clause); *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975) (holding ordinance prohibiting the showing of films with nudity by a drive-in theater invalid on its face); *U.S. Sound & Service, Inc. v. Township of Brick*, 126 F.3d 555 (3d Cir. 1997) (holding that conditions imposed on adult video store's "change of use" application violated the First Amendment); *Loftus v. Township of Lawrence Park*, 764 F. Supp. 354 (W.D. Pa. 1991) (enjoining township from enforcing ordinance prohibiting the posting of political yard signs).

amendment.” *Gregoire v. Centennial School Dist.*, 907 F.2d 1366, 1370 (3d Cir. 1990), *cert. denied* 498 U.S. 899 (1990). Plaintiffs’ activities – worship and other religious expressive activities – fall within the heart of the protections afforded by the Free Speech Clauses of both the federal and Pennsylvania Constitutions.<sup>31</sup>

It is well-established that zoning laws that regulate expressive activity implicate the Free Speech Clause. *See, e.g., City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61 (1981); *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975). At a minimum, zoning laws must not be based on the content of the expression they suppress. *See Renton*, 475 U.S. at 48; *Desert Outdoor Advertising v. City of Moreno Valley*, 103 F.3d 814, 819 (9<sup>th</sup> Cir. 1996) (“[A]n ordinance is invalid if it ... regulates noncommercial [speech] based on content.”) (quotations omitted). To be content-neutral, zoning laws must avoid *both* prohibiting expression because of its subject-matter, *and* prohibiting expression because of its viewpoint on a subject-matter. *See Consolidated Edison Co. of New York, Inc. v. Public Serv. Comm’n of New York*, 447 U.S. 530, 537 (1980) (“The First Amendment’s hostility to content-based regulation extends not only to restrictions on particular *viewpoints*, but also to prohibition of public discussion of an *entire topic*.”) (emphasis added).

Here, the applicable zoning laws, by their very terms, regulate assembly uses in the Township’s residential districts differently based on the content of the expression at those assemblies. In particular, they draw a distinction along religious lines. For example, people may at least request permission to assemble in residential districts at a country club for tennis lessons or

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<sup>31</sup> The standards applied under Article I, sec.7 of the Pennsylvania Constitution are at least as strong as those of the Free Speech Clause of the First Amendment to the United States Constitution. *Bureau of Prof’l. & Occupational Affairs v. State Bd. of Physical Therapy*, 728 A.2d 340 (Pa. 1999).

to cheer a tennis match, but if people (such as the Plaintiffs here) wish to similarly assemble for a lesson on the Torah or for religious worship they are absolutely prohibited. *See* 1996 Ordinance §§ 301.2.B.2.-4., 706.E.8., 706.G.6. Similarly, people may obtain permits to assemble for secular study and events at libraries in residential districts, but are absolutely forbidden from assembling for religious study and expression at a place of worship. *See id.* These zoning laws impose greater burdens on speech because (at a minimum) it addresses the general *subject-matter* of religion, and because (more likely) of the particular religious *viewpoint* it expresses. Additional discovery on this issue should provide greater clarity.

Furthermore, the application of the Township's zoning ordinances also appears to be based on hostility to the Congregation's particular religious viewpoint, as shown by the Township's determination to force the outcome of the Congregation's initial use application; the Township's continuing insistence that this Congregation will wreak havoc on the neighborhood, notwithstanding its admission elsewhere that it would not; the fact that the Township's decision making is informed by neighbors who are determined to keep this synagogue far away, even though their nominally neutral (but pretextual) concerns over traffic, noise, and light can be addressed readily without prohibiting the use altogether; and its Planning and Zoning Officer's preference for the religious viewpoint of the predecessor convent, which also happens to be affiliated with one of the faiths that is better established locally. *See supra* Factual Statement, Sections E. & H. Whether subject-matter-based or viewpoint-based, the Township's favor for the viewpoints of religious assemblies that are better established locally – and its corresponding disfavor for the religious viewpoint of the religious assembly that Plaintiffs represent – is based on the *content* of the speech occurring at those assemblies, and so violates the Free Speech Clause.

The Township's bare assertion, *see* Defs. Mem. 43, that there is no violation of the Free Speech because the Congregation could assemble at some unidentified alternative is foreclosed by precedent. The First Amendment simply does not allow the government to employ the invidious tool of content discrimination at will so long as it happens to allow citizens to speak freely in some other location, no matter how undesirable; rather, it extends to citizens not only the right to engage in protected expression, "but also to select what they believe to be the most effective means for so doing." *Meyer v. Grant*, 486 U.S. 414, 424 (1988); *see also FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 255 (1986) (fact that government's suppression of speech leaves open other avenues of communication does not relieve its burden on First Amendment expression); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 76-77 (1981). ("[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.")

Moreover, even aside from the Township's impermissible content-based suppression of the Congregation's religious expression, the Township has failed to make even the showing necessary to justify content-neutral time, place, and manner restrictions on expression. It is well-established that such restrictions must "serve significant state interests but also must leave open adequate alternative channels of communication." *Schad*, 452 U.S. at 75-76. The Third Circuit, in a case involving "regulations that restrict the time, place and manner of expression in order to ameliorate undesirable secondary effects of sexually explicit expression" has described this standard as "intermediate scrutiny." *Phillips v. Borough of Keyport*, 107 F.3d 164 (3d Cir. 1997) *cert. denied*, 522 U.S. 932 (1997).<sup>32</sup> Certainly, time, place and manner restrictions to ameliorate any "secondary

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<sup>32</sup>Defendants notably fail even to cite the controlling standard of *Phillips*.

effects” of religious expression demand at least equivalent scrutiny.<sup>33</sup> As discussed above, Defendants cannot assert a “significant state interest,”<sup>34</sup> and more importantly, Defendants fail to offer any evidence, beyond a self-serving assertion, Defs. Mem. at 43, that alternative channels of communication exist for the Congregation to assemble for religious expression.

In fact, *no* such alternatives exist for the Congregation in the Township. The Zoning Ordinance prohibits new places of worship in all of the Township’s residential districts. Although churches are ostensibly permitted in the Township’s remaining three districts, these districts represent a small percentage of the total acreage constituting the Township. *See* Zoning Map. Moreover, the land in those zones is already developed and not for sale, or otherwise incompatible with use as a house of worship. *Id.* *See also* Milbert Decl. ¶¶ 4-7. For example, as of 1992, cemeteries alone occupied 3% to 4% of *all* acreage in Abington, thus excluding the bulk of Community Service zones from even potential use as a synagogue. 1992 Plan, at 61, 69. In addition, not only has the Congregation been unable to locate any other property in the Township adequate for religious assembly after a nearly four-year search, but the districts where it could theoretically locate are inadequate for Plaintiffs’ religious purposes. Sloviter Decl. ¶¶ 5-11. *See also* Milbert Decl., ¶¶ 4-7 (after a search of the Multiple Listing Service, newspaper listings, and a

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33It is ironic – and even more so here because the Township claims that a place of worship would “jeopardize the safety and welfare of the residents,” Defs. Mem. at 43 – that in the zoning context, the Congregation must rely on cases involving adult entertainment to support its Free Speech claims. *See Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 767 (1995) (“It will be a sad day when this Court casts piety in with pornography, and finds the First Amendment more hospitable to private expletives, than to private prayers.”) (citation omitted). However, Plaintiffs are entitled to at least the same level of protections against zoning restrictions that are granted to adult-oriented uses.

34 In addition, the fact that the Township permits numerous Christian churches in its residential districts and permitted other religious use of the target Property for 50 years prior to the Congregation’s attempted use fatally undermines the Township’s ability to claim negative secondary effects arising from the Congregation’s desired religious expression.

number of brokers handling commercial real estate, “I have not found any properties that are currently available in the [CS, M, and AO] zoning districts in Abington Township that met Congregation Kol Ami’s requirements.”). At the very least, disputed issues of material fact remain, thereby precluding summary judgment, as to whether alternative channels of communication exist for the Congregation to engage in its desired religious expression. For all these reasons, Defendants’ Motion for Summary Judgment on Counts III and IV must therefore be denied.

**D. Genuine Issues of Material Fact and Incomplete Discovery Preclude Summary Judgment on Counts V and VI, Plaintiffs’ Claims for Violation of the Federal and Pennsylvania Rights to Freedom of Assembly**

Defendants’ policy of refusing to allow Plaintiffs to use their Property in a residential district for religious purposes also violates their right to freely associate for expressive purposes.<sup>35</sup> The ability of the Congregation to worship together in a permanent home conducive to its religious exercise, as well as to pursue other religious activities, falls squarely within the First Amendment’s protection of freedom of association. The Supreme Court has recognized that the First Amendment protects an independent right of freedom of association, and has repeatedly mentioned *religious* associations as among those entitled to this protection. *NAACP v. Alabama*, 357 U.S. 449, 461 (1958). Laws that intrude on this freedom are “subject to the closest scrutiny.” *Id.* (emphasis added).

Indeed, the Supreme Court has made clear that the right to freely associate preserves “a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the *exercise of religion*.”

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<sup>35</sup> Actually, the Township only forbids *new* congregations from locating in these districts. For some reason, the 25 places of worship that currently exist in residential districts, Def. Mem. at 7, do not harm the “significant government interests” which necessitated the denial of Plaintiffs’ application. The reason for this is simple: Places of worship are inherently proper uses in residential districts.

The Constitution guarantees freedom of association of this kind as an indispensable means of preserving other individual liberties.” *Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984) (emphasis added); *see also id.* at 622 (“An individual’s freedom to speak, *to worship*, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed. . . . [W]e have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, *religious*, and cultural ends.”) (citations omitted; emphases added). *See also Doe v. Butler*, 892 F.2d 315, 323 (3d Cir. 1989) (discussing, in the context of a zoning case, “the right to associate for the purpose of engaging in those activities protected by the First Amendment – speech, assembly, petition for the redress of grievances, and the *exercise of religion*.”) (emphasis added).

The Third Circuit has further defined the contours of the right to freely associate for purposes of religious expression:

*Roberts* also made clear that the government action must not only be “intrusive,” but must have an actual, rather than speculative, impact on the group in its exercise of First Amendment rights of expression. *Id.* at 626-28. Thus far, courts have recognized two different types of impact: (1) the challenged state action may have a demonstrable effect on the group’s message, *e.g.*, *Democratic Party of United States v. Wisconsin*, 450 U.S. 107 (1981); . . . , or (2) the state action may diminish the organization’s effectiveness by discouraging individuals from associating with the organization, *e.g.* *NAACP v. Alabama*.

*Salvation Army*, 919 F.2d at 200-01.

Plaintiffs meet this standard. Defendants’ zoning laws are “intrusive”: Plaintiffs are totally unable to use their Property for religious purposes, or otherwise to secure a home for their assembly

in the Township. Plaintiffs' assembly for religious purposes is absolutely forbidden on the Property and in all residential districts, and the Township's other zoning districts, where a new synagogue might be permitted in theory, do not include properties the Congregation could actually use, least of all ones that are available for sale. *Id.* ¶¶ 8-9. Contrary to Defendants' unsupported assertion, there are no available "alternative avenues for the Congregation beyond this solitary parcel." Defs. Mem. at 20-21, 45, 49. *See* Milbert Decl. ¶ 6-7 (stating that, after a search of the Multiple Listing Service, newspaper listings, and a number of brokers handling commercial real estate, no properties are currently available that meet the Congregation's requirements).

Defendants' zoning laws also "have a demonstrable effect on the group's message." The Congregation desires to "provide stability, inspiration and hope" to the residential community by fulfilling its mission of providing a welcoming, intimate atmosphere in a tranquil environment that is an alternative to the larger synagogues in the area. Holin Decl. ¶¶ 3, 8, 9, 22. "A synagogue is known by its place of worship." *Id.* ¶ 5. The Congregation is "eager to have a spiritual home of [its] own in a residential community because everything that we teach our children and our adults emphasizes the importance of involvement and service to the community." "Do not separate yourself from the community," [Ethics of the Fathers], *Pirkei Avot* 2.4." *Id.* ¶ 8. *See also* Sloviter Decl. ¶¶ 16-25. Defendants' zoning laws and their application those laws to deny Plaintiffs the religious use of the Property have effectively silenced the Plaintiffs' ability to communicate their message in the Township.

Defendants' actions also "diminish the organization's effectiveness by discouraging individuals from associating with the organization." Sloviter Decl. ¶ 18 ("Due to the fact that Kol Ami does not have a permanent home, a number of its members have resigned to join congregations

with a permanent physical home or synagogue.”); *Id.* ¶ 24 (“Because of the Abington Zoning Hearing Board’s decision to reject Kol Ami’s application, a few members have rescinded their commitments to contribute to our capital campaign”). Thus, the Township’s zoning laws “have the effect of curtailing” the Congregation’s “freedom to associate,” and, as *Salvation Army* requires, there is an “actual, rather than speculative impact on the group in its exercise of First Amendment rights of expression.”<sup>36</sup>

Since strict scrutiny must be applied to such restrictions on association, *Salvation Army*, 919 F.2d at 201 (requiring law to be “narrowly tailored to a compelling interest.”), and Defendants fail to meet this standard, *see supra*, Defendants’ Motion for Summary Judgment on Counts V and VI must also be denied.

**E. Genuine Issues of Material Fact and Incomplete Discovery Preclude Summary Judgment on Counts VII, VIII, and IX, Plaintiffs’ Claims Under the Federal and Pennsylvania Equal Protection Clauses and the Federal Due Process Clause**

**1. Summary judgment should be denied on Plaintiffs’ claim that Abington’s Ordinance, both on its face and as applied, fails rational basis scrutiny**

Since virtually the advent of zoning, local ordinances have been subject to constitutional scrutiny – at a minimum – under the rational basis test, which is defined similarly under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *See, e.g., Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 121 (1928) (striking down zoning ordinance under Due Process

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<sup>36</sup>In addition, Defendants have violated Plaintiffs’ free association rights in another way. The government violates the guarantee of Freedom of Association when it “withholds benefits” because of “membership in a disfavored group.” *Roberts*, 468 U.S. at 622. As discussed *supra*, there is substantial evidence demonstrating that Defendants’ application of their laws to deny Plaintiffs the use of the Property for religious purpose was because of discrimination against Plaintiffs’ religious beliefs.

Clause for failure to “bear a substantial relation to the public health, safety, morals, or general welfare”); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985) (striking down zoning ordinance under Equal Protection Clause because not “rationally related to a legitimate state interest”).

In applying this general requirement of reasonableness, the vast majority of courts have found that it is unreasonable to prohibit houses of worship from all residential areas in a jurisdiction. *See* Memorandum of Law in Support of Plaintiffs’ Motion for Partial Summary Judgment (June 13, 2001), at 7-11 (citing numerous cases and treatises in support of this proposition of law). This Court never addressed that basis for summary judgment. Nor did the Court of Appeals, even though the Congregation raised the same claim as an alternative grounds for affirmance. Instead, the Court of Appeals specifically noted that the issue “need[s] to be considered on remand.” 309 F.3d at 144. Although the Court of Appeals offered some guidance on remand regarding this claim, that guidance appears, in fact, to be directed against an extreme claim that is substantially broader than the Congregation’s actual claim in this regard. *See* 309 F.3d 139 n.5.

Thus, even though this facial, rational-basis claim is still alive, the Township has *not* moved for summary judgment against it. Accordingly, the Congregation will save its arguments in support of this claim – including the clarifications necessary to address the concerns of the Third Circuit – for its own, affirmative summary judgment motion to be filed soon.<sup>37</sup> *See* Defs. Mem. 44-66 (addressing rational basis claims under Equal Protection and Due Process Clauses).

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<sup>37</sup>In the abundance of caution, the Congregation now incorporates herein by reference the arguments it will make in support of its future motion for summary judgment attacking the Abington Ordinance, on its face, because it prohibits houses of worship in every residential zone in the jurisdiction.

The Township does, however, move for summary judgment on Plaintiff's as-applied Due Process claim, based primarily on the argument that the Township's conduct does not meet the demanding "shocks the conscience" test. *See* Defs. Mem. 59-66. Though ongoing discovery may reveal still more unconstitutionally shocking conduct, there is already enough in the record to preclude summary judgment. Specifically, the decision-making of the ZHB and other Township officials in this case bears the hallmarks of classic arbitrary and capricious government action – predetermination of the outcome regardless of the merits; contradiction within the decision and with prior and subsequent decisions, and consideration of impermissible factors. *See supra* Factual Statement, Section E, (identifying contradictions within and among ZHB decisions, consideration of religious factors by Planning and Zoning Officer, and consideration of hostility of neighbors); Argument Section II.A.3.a., *supra* (describing contradiction between ZHB conclusions in August 2001 decision and Township's current position in defense of March 2001 decision). This unconstitutional degree of unreasonableness in application of the ordinance is only reinforced by the systemic preference against religious assembly and institutional uses that pervades the latest revision of the Ordinance, thus harming religious groups that are not as well established locally.

Put in other terms, a municipality can hardly be considered rational from a constitutional standpoint when – at great expense in time and treasure – it totally prohibits a use that it finds "will not adversely affect the health safety and welfare of the community"; when it considers 80 celibate nuns a "single family" for purposes of its zoning ordinance because they are all married to God as a matter of Catholic doctrine; and when it disfavors religious newcomers at every turn, both by the terms of its Ordinance, and by forcing outcomes against them in particular cases – especially when any adverse external effects of the use can be readily mitigated. At a bare minimum, the Court

should conclude that a reasonable jury could find this conduct to “shock the conscience,” and that summary judgment is therefore inappropriate. And if not, the Court should allow the Congregation to do more than scratch the surface in discovery on this troubling pattern of conduct by the Township.

Finally on rational basis, the Township tries to convince this Court to do what the Court of Appeals already decided it could not – determine whether this Congregation is “similarly situated” to a “country club” for Equal Protection purposes based only on the language of the Ordinance. Compare Defs. Mem. 50-56, with *Kol Ami*, 309 F.3d at 142. Specifically, the Township simply restates its interpretation of “country club” that the Third Circuit has found “rather crabbed” and “less than fully convincing.” If the language of the Ordinance is inadequate alone to assess “similarity of uses,” then further discovery must be necessary before this Court can make that assessment. Moreover, the Congregation also intends to explore through discovery whether the libraries allowed in the low-density residential zones of the district are “similarly situated” for Equal Protection purposes – a type of use that may seek a special exception in those zones, but which the Third Circuit did not address in its opinion. Therefore, summary judgment on the Congregation’s as-applied, rational-basis claim under *Cleburne* should be denied.

**2. Summary judgment should be denied on Plaintiffs’ claim that Abington’s Ordinance, both on its face and as applied, triggers and fails strict scrutiny**

Strict scrutiny applies under the Due Process Clause when government infringes a fundamental right – such as the free exercise of religion – and under the Equal Protection Clause when government employs a suspect classifications – such as religion. See *City of New Orleans v. Duke*, 427 U.S. 297, 303 (1976) (listing “race, religion [and] alienage” as suspect classifications

that trigger heightened scrutiny under the Equal Protection Clause); *Johnson v. Robison*, 415 U.S. 361, 375 n.14 (1974) (“Unquestionably, the free exercise of religion is a fundamental constitutional right.”); *Fellowship Baptist Church v. Benton*, 815 F.2d 485, 497 (8<sup>th</sup> Cir. 1987) (holding that “[b]ecause religion is a fundamental right, any classification of religious groups is subject to strict scrutiny.”).

For all the reasons set forth above that Plaintiffs have generated issues of fact on their claim of discrimination based on religion under the Free Exercise Clause, *see supra* Section II.A.1., Plaintiffs have also generated factual issues as to whether Defendants have infringed Plaintiffs fundamental right to the free exercise of religion (triggering strict scrutiny under the Due Process Clause) and have engaged in government action according to the suspect classification of religion (triggering strict scrutiny under the Equal Protection Clause). For all the reasons set forth above that Defendants will fail to satisfy strict scrutiny under the Free Exercise Clause, *see supra* Section II.A.3., Defendants will similarly fail to satisfy strict scrutiny under the Due Process and Equal Protection Clauses.

**F. Genuine Issues of Material Fact and Incomplete Discovery Preclude Summary Judgment on Counts X, XI, and XII, Plaintiffs’ Claims Under RLUIPA**

**1. Summary judgment should be denied on Plaintiffs’ claim that RLUIPA Section 2(a) has been violated**

RLUIPA Section 2(a)(1) provides, in relevant part, as follows:

- (1) GENERAL RULE- No government shall impose or implement a land use regulation in a manner that imposes a *substantial burden* on the *religious exercise* of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution--
  - (A) is in furtherance of a *compelling governmental interest*; and
  - (B) is the *least restrictive means* of furthering that compelling governmental interest.

(2) SCOPE OF APPLICATION- This subsection applies in any case in which –

(B) the substantial burden *affects*, or removal of that substantial burden would affect, *commerce* with foreign nations, *among the several States*, or with Indian tribes, even if the burden results from a rule of general applicability; or

(C) the substantial burden is imposed in the implementation of a land use regulation or *system of land use regulations*, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, *individualized assessments of the proposed uses for the property involved*.

(Emphasis added.)

As discussed above in connection with plaintiffs’ Free Exercise/substantial burden claim, the Township has burdened the Rabbi’s and the Congregation’s religious exercise pursuant to a system of “individualized assessments.” *See supra* Section II.A.2. ***Freedom Baptist Church***, 204 F. Supp. 2d at 868 (“What Congress manifestly has done in this subsection is to codify the individualized assessments jurisprudence in Free Exercise cases that originated with the Supreme Court’s decision in *Sherbert*.”) And as will be discussed below in connection with the constitutionality of RLUIPA under the Commerce Clause, the burden imposed by the Township also directly suppresses economic activities – namely, repaving and renovation of the Property, as well as its ongoing use as a house of worship – which, in the aggregate, substantially affect interstate commerce. *See infra* Section III.B.2. Therefore, Plaintiffs have generated an issue of fact that the substantial burden test of Section 2(a)(1) applies here for two independently sufficient reasons, namely, that the facts of this case satisfy both Section 2(a)(2)(B) and Section 2(a)(2)(C).

Similarly, for the reasons set forth previously, *see supra* Section II.A.2., Plaintiffs have generated issues of fact regarding whether the Township has imposed a “substantial burden” on plaintiffs’ religious exercise by excluding them from the Property, which the Congregation equitably owns, which meets their religious needs (including for a permanent home), which is the only

available property in Abington that meets those needs; and exclusion from which threatens the continuing viability of the Congregation.

Moreover, even though Plaintiffs do not need to do so in order to state a claim under RLUIPA Section 2(a), they have shown that the Township will be unable to prove that the burden it imposes on the Congregation's religious exercise is the least restrictive means to serve a compelling government interest. *See supra* Section II.A.3. Thus, the Court should find that Plaintiffs have created a genuine issue of material fact as to their claim under RLUIPA Section 2(a).

**2. To the extent the Township moves for summary judgment on Plaintiffs' other RLUIPA claims, that motion should be denied**

Although the Township asserts that all three RLUIPA counts "must be dismissed," *See* Defs. Mem. 16, 21, it only cites and discusses the "Substantial Burdens" provision, which is Section 2(a) of the Act and is asserted in this case only in Count XI. *See id.* 16-21. The Township claims, however, that the substantial burden showing is somehow a "threshold requirement" for all RLUIPA claims. *Id.* at 21. But the language and structure of the statute – as well as the constitutional law it purports to codify – indicate the opposite. By their very terms, none of the provisions of Section 2(b) require a showing of "substantial burden"; if Congress had wanted to impose that requirement for Section 2(b) claims, it could have made that requirement explicit, as it did for Section 2(a) claims. But there is a good reason why Congress did not want to limit Section 2(b) claims in this way. The distinction between 2(a) and 2(b) in the statute reflects an important distinction in Free Exercise jurisprudence between claims of discretionary, substantial burdens on religious exercise on the one hand, and claims of religion-based discrimination (of various forms) on the other. *See Brown v. Borough of Mahaffey*, 35 F.3d 846, 849-50 (3d Cir. 1994) (rejecting requirement to show

“substantial burden” for discrimination claims, because it “would make petty harassment of religious institutions and exercise immune from the protections of the First Amendment.”)

Nor is this altered by Section 5(e), which the Township cites without discussion. That provision simply states that a government *that imposes substantial burdens* may avoid compulsion under the Act if it withdraws that burden. This is confirmed by the legislative history of the Act. *See* House Subcomm. on the Constitution, Statement of Prof. Douglas Laycock (May 12, 1999) (available at <<http://www.house.gov/judiciary/lay0512.htm>>) (“Section 5(e) states explicitly what would be obvious in any event – that a government *that burdens religious exercise* has discretion over the means of eliminating the burden.”) (emphasis added). Of course, where a government never imposes a substantial burden in the first place – but instead discriminates or otherwise violates some part of Section 2(b) – Section 5(e) has no application.

But even if the Court would treat a “substantial burden” showing as a prerequisite to Section 2(b) claims, that prerequisite is satisfied, as recounted in detail above. *See supra*, Section II.A.2. Thus, any motion for summary judgment against the Congregation’s claims under Section 2(b) should be rejected.

### **III. SUMMARY JUDGMENT ON PLAINTIFFS’ RLUIPA CLAIMS SHOULD BE DENIED BECAUSE THE ACT IS CONSTITUTIONAL, BOTH ON ITS FACE AND AS APPLIED HERE**

Defendants claim that the “Substantial Burdens” provision of the land-use section of RLUIPA, 42 U.S.C. § 2000cc(a) (“Section 2(a)”), is facially unconstitutional on four grounds: (1) it treads on an area of local control that federal law may never, ever reach; (2) it exceeds Congress’ enumerated power under the Enforcement Clause of the Fourteenth Amendment;<sup>38</sup> (3) it exceeds

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<sup>38</sup> Section 5 of the Fourteenth Amendment provides that “The Congress shall have power to enforce, (continued...) ”

Congress' enumerated power under the Commerce Clause of Article I;<sup>39</sup> and (4) it violates the Establishment Clause. *See* Defs. Mem. 22-42.<sup>40</sup>

In support, the Township cites not a single case finding any part of RLUIPA unconstitutional. Thus, the Township has utterly ignored the overwhelming weight of authority in support of the constitutionality of the Act: the already numerous federal decisions that have rejected (in both land-use and prison contexts) each and every challenge raised here.<sup>41</sup> Because the Township has not even

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(...continued)

by appropriate legislation, the provisions of this article,” which include the prohibition in Section 1 against “any State[’s] depriv[ing] any person of life, liberty, or property, without due process of law,” or “deny[ing] to any person within its jurisdiction the equal protection of the laws.” **U.S. Const. amend. XIV, §§ 1, 5.**

<sup>39</sup> Section 8 of Article I provides in relevant part that “The Congress shall have power ... [t]o regulate commerce with foreign nations, and among the several states, and with the Indian tribes.” **U.S. Const. art. I, § 8, cls. 1, 3.**

<sup>40</sup>The Congregation notes that the Township’s current challenge to the constitutionality of RLUIPA is considerably narrower than the challenge raised in its June 2001 Motion. First, the present motion challenges only Section 2(a) of RLUIPA, the “Substantial Burdens” provision, and not Sections 2(b)(1), 2(b)(2), or 2(b)(3)(B), which are also at issue in this case. *See* Defs. Mem. 22-42 (citing and discussing, in both headings and text, only Section 2(a) of RLUIPA). Second, the “roadmap” paragraph of the Township’s new constitutionality section both lists challenges that are not backed with any substantive arguments, *see* Defs. Mem. 22 & nn.5-6 (claiming violations of “the separation of powers” and “the constitutional amendment procedures found in Article V” in short footnotes), and fails to list challenges that are argued in detail later in the brief. *See id.* at 35-39 (arguing violation of Commerce Clause). The Congregation will limit its response to the challenges actually made in reasonable detail, regardless of brief introductory paragraphs or footnotes suggesting others. *See Kirschbaum v. WRGSB Assocs.*, 243 F.3d 145, 151 (3d Cir. 2001) (refusing to decide arguments “on their merits since they are poorly briefed and deserve more development than passing mention in a footnote for us to take them seriously”). To the extent the Court would nonetheless consider overturning an Act of Congress based on the Township’s “separation of powers” and “Article V” footnotes – which have been relegated to the footnotes for a reason – the Congregation hereby incorporates by reference its original response to those arguments when they were first made in the Township’s June 2001 Motion. *See* Pltfs. 7/5/01 Opp. Mem. 65-66.

<sup>41</sup> *See, e.g., Mayweathers v. Newland*, 314 F.3d 1062 (9<sup>th</sup> Cir 2002) (rejecting Spending Clause, Establishment Clause, Tenth Amendment, Eleventh Amendment, and Separation-of-Powers challenges); *Johnson v. Martin*, 223 F. Supp. 2d 820 (W.D. Mich. 2002) (rejecting Commerce, Spending, Establishment Clause, and Tenth Amendment challenges); *Gerhardt v. Lazaroff*, 221 F.

(continued...)

started to overcome the strong presumption of constitutionality ordinarily afforded Acts of Congress, the Township's motion should be denied.<sup>42</sup>

**A. The Local Character of Land-Use Regulation Does Not Immunize It from Federal Laws Protecting First Amendment Interests, Such as Religious Exercise**

After a providing skewed history of RLUIPA, the Township begins its attack on the Act by emphasizing the obviously local character of most land use decisions, but then goes a step farther, arguing that this local character both: (1) mandates deferential judicial scrutiny in *every* case, and (2) precludes the imposition of any meaningful federal parameters on those decisions. *See* Def. Mem. 26-28. Both claims are false and, in any event, are not arguments against the constitutionality of the Act.

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41(...continued)

Supp. 2d 827 (S.D. Ohio 2002) (rejecting Spending Clause, Establishment Clause, and Tenth Amendment challenges); *Charles v. Verhagen*, 220 F. Supp. 2d 955 (W.D. Wis. 2002) (same); *Freedom Baptist Church v. Tp. of Middletown*, 204 F. Supp. 2d 857 (E.D. Pa. 2002) (rejecting Enforcement, Commerce, and Establishment Clause challenges); *Christ Universal Mission Church v. City of Chicago*, No. 01-C-1429, 2002 U.S. Dist. LEXIS 22917, at \*24 (N.D. Ill. Sept. 11, 2002) (rejecting constitutionality challenge, adopting reasoning of *Freedom Baptist Church*). *See also Hale O Kaula v. Maui Planning Comm'n*, 223 F. Supp. 2d 1056, 1072 (D. Haw. 2002) (declining to address constitutionality of RLUIPA in detail, but concluding that “jurisdictional element” of § 2(a)(2)(B) precludes Commerce Clause challenge, and that § 2(a)(2)(C) “codifies the ‘individualized assessments’ doctrine”); *Cottonwood Christian Center v. City of Cypress*, 218 F. Supp. 2d 1203, 1221 n.7 (C.D. Ca. 2002) (noting that “RLUIPA would appear to have avoided the flaws of its predecessor RFRA, and be within Congress’s constitutional authority,” citing *Freedom Baptist Church*).

<sup>42</sup> *See United States v. Morrison*, 529 U.S. 598, 606 (2000) (“Due respect for the decisions of a coordinate branch of government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds.”). *See also Walters v. Nat’l Ass’n of Radiation Survivors*, 473 U.S. 305, 319 (1985) (“Judging the constitutionality of an Act of Congress is properly considered ‘the gravest and most delicate duty that this Court is called upon to perform.’”) (quoting *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981) (quoting *Blodgett v. Holden*, 275 U.S. 142, 148 (1927))).

Deferential, rational-basis scrutiny *typically* applies to most land-use decisions, just as it *typically* applies to most other state and local government actions.<sup>43</sup> But that deferential standard does not *always* apply; judicial scrutiny is heightened when the zoning actions threaten fundamental First Amendment interests, such as religious exercise.<sup>44</sup> The Supreme Court has summarized the matter succinctly:

The power of local governments to zone and control land use is undoubtedly broad and its proper exercise is an essential aspect of achieving a satisfactory quality of life in both urban and rural communities. But the zoning power is not infinite and unchallengeable; it “must be exercised within constitutional limits.” Accordingly, it is subject to judicial review; and [as] is most often the case, the standard of review is determined by the nature of the right assertedly threatened or violated rather than by the power being exercised or the specific limitation imposed.

**Schad v. Borough of Mt. Ephraim**, 452 U.S. 61, 68 (1981) (citations omitted). In other words, the level of scrutiny is unaffected by the mere fact that zoning laws are at issue; instead, the level of scrutiny hinges on the type of constitutional interest affected by whatever law is at issue, zoning or otherwise.<sup>45</sup>

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43 **City of Cleburne v. Cleburne Living Ctr., Inc.**, 473 U.S. 432, 440 (1985) (Equal Protection Clause ordinarily requires laws to be “rationally related to a legitimate state interest”); *see also* **Wolff v. McDonnell**, 418 U.S. 539, 558 (1974) (“The touchstone of due process is protection of the individual against arbitrary action of government, **Dent v. West Virginia**, 129 U.S. 114, 123 (1889).”).

44 *See* **Schad v. Borough of Mt. Ephraim**, 452 U.S. 61, 68-69 (1981); *see also* **Employment Div. v. Smith**, 494 U.S. 872, 886 n.3 (1990) (“Just as we subject to the most exacting scrutiny laws that make classifications based on race, or on the content of speech, we strictly scrutinize governmental classifications based on religion.”) (citations omitted); **City of New Orleans v. Dukes**, 427 U.S. 297, 303 (1976) (listing religion among suspect classifications that trigger strict scrutiny).

45 *See* **Schad**, 452 U.S. at 68 (“[T]he standard of review is determined by the nature of the right assertedly threatened or violated rather than by the power being exercised or the specific limitation imposed.”) *See also* **Groome Resources, Ltd. v. Parish of Jefferson**, 234 F.3d 192, 215 (5<sup>th</sup> Cir. 2000) (rejecting “incantation of ‘local zoning’ and ‘traditional’ authority,” because “it does not serve the balance of federalism to allow local communities to discriminate against the disabled”).

Moreover, federal courts apply these federal limitations on local zoning regulations routinely and with force. From the dawn of zoning to the present day, the Supreme Court itself has struck down zoning regulations for failure to satisfy *even rational basis scrutiny*.<sup>46</sup> Although the Supreme Court has yet to address the precise issue, lower courts have consistently applied heightened scrutiny to zoning ordinances (and other laws) under the Free Exercise Clause whenever they impose a “substantial burden” on religious exercise pursuant to a system of “individualized assessments.”<sup>47</sup>

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<sup>46</sup> See, e.g., *Cleburne*, 473 U.S. at 440; *Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 121 (1928); *Nectow v. Cambridge*, 277 U.S. 183, 188-89 (1928). See also *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000) (affirming denial of motion to dismiss rational-basis challenge of zoning decision).

<sup>47</sup> See, e.g., *Hale O Kaula*, 223 F. Supp. 2d at 1073 (finding special use permit provisions at issue to be “a system of ‘individualized exemptions’ to which strict scrutiny applies” under the Free Exercise Clause, whether or not RLUIPA applies); *Cottonwood Christian Center*, 218 F. Supp. 2d at 1222 (noting that *Smith* “left undisturbed the application of a strict scrutiny test to situations where there are ‘individualized governmental assessment[s],’” and finding land-use decisions before the court to fall in that category); *Keeler v. Mayor of Cumberland*, 940 F. Supp. 879, 885 (D. Md. 1996) (holding that landmark ordinance “has in place a system of individualized exemptions”); *Alpine Christian Fellowship v. County Comm’rs*, 870 F. Supp. 991, 994-95 (D. Colo. 1994) (holding that denial of special use permit triggered strict scrutiny because determination was made under discretionary “appropriate[ness]” standard); *Korean Buddhist Dae Won Sa Temple v. Sullivan*, 953 P.2d 1315, 1344-45 n.31 (Haw. 1998) (“The City’s variance law clearly creates a ‘system of individualized exceptions’ from the general zoning law.”); *First Covenant Church v. City of Seattle*, 840 P.2d 174, 181 (Wash. 1992) (holding that landmark ordinances “invite individualized assessments of the subject property and the owner’s use of such property, and contain mechanisms for individualized exceptions”). See also *Freedom Baptist Church*, 204 F. Supp. 2d at 868 (“[L]and use regulations through zoning codes necessarily involve case-by-case evaluations of the propriety of proposed activity against extant land use regulations,” and so “impose individual assessment regimes.”); **Douglas Laycock, *State RFRA’s and Land Use Regulation***, 32 U.C. DAVIS L. REV. 755, 767 (1999) (“Land use regulation is among the most individualized and least generally applicable bodies of law in our legal system. The whole point of requiring a special use permit is to provide for ‘individualized governmental assessment’ of the proposed use.”); H.R. REP. NO. 106-219, at 17 (“Local land use regulation, which lacks objective, generally applicable standards, and instead relies on discretionary, individualized determinations, presents a problem that Congress has closely scrutinized and found to warrant remedial measures under its section 5 enforcement authority.”).

Thus, any suggestion that local zoning decisions are not meaningfully constrained by federal protections of religious exercise – with or without RLUIPA – should be dismissed out of hand.

Indeed, one of the primary purposes of RLUIPA is to shake local zoning officials out of precisely the mindset reflected in the Township’s brief here: that they are free to disregard federal free exercise protections simply because they are operating in the local arena of land use.<sup>48</sup> As detailed below, the hyperbole and hysteria reflected in the Township’s brief here (and similar briefs we have encountered elsewhere) is simply an attempt to distract courts from this basic fact. The sky will not fall if RLUIPA continues to be upheld and applied widely; instead, free exercise protections that, for the most part, *already apply to these local officials* will simply be enforced more routinely and consistently.

**B. RLUIPA Section 2(a) Is a Proper Exercise of Congress’ Enumerated Power Under Section 5 of the Fourteenth Amendment**

Defendants claim that RLUIPA Section 2(a) exceeds congressional authority under Section 5 of the Fourteenth Amendment, commonly known as the Enforcement Clause. *See* Def. Mem. 29-35. They claim that RLUIPA suffers the same flaws as its predecessor, the Religious Freedom Restoration Act (“RFRA”): that Congress had no evidence of “widespread and persisting” constitutional violations in the land use context, and that, in any event, RLUIPA is not a “congruent and proportional” remedy to any such violations. *Id.* at 29.<sup>49</sup>

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<sup>48</sup> *See* Picarello & Storzer, “When Land Use Issues Are Also Religious Freedom Issues: The Religious Land Use and Institutionalized Persons Act of 2000 and the Four Constitutional Commandments of Zoning,” *FindLaw’s Writ* (Jan. 30, 2002) (available at <[http://writ.news.findlaw.com/commentary/20020130\\_storzer.html](http://writ.news.findlaw.com/commentary/20020130_storzer.html)>).

<sup>49</sup> The Congregation notes at the outset that the Township has misstated the Enforcement Clause analysis, which examines the congressional record for some “history and pattern” of constitutional (continued...)

Although RFRA and RLUIPA are similar in some respects – both were designed to strengthen the protection of religious liberty and both were passed by overwhelming margins as a result of broad, bipartisan support – they are different in all respects relevant to the Supreme Court’s Enforcement Clause analysis in *City of Boerne v. Flores*, 521 U.S. 507 (1997), and its progeny. This crucial difference is the result of a painstaking effort by legislators and legal scholars to *comply* with the requirements of *Flores* – not, as Defendants suggest, to defy it or to usurp judicial authority to define constitutional violations. *See* Defs. Mem. 23-25. Accordingly, RLUIPA codifies *current* First and Fourteenth Amendment standards – based on *overwhelming* evidence in the legislative history demonstrating the need for better enforcement of those standards – and institutes eminently proportional remedies, vastly narrower than the evidence could support. Thus, by design, RLUIPA

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49(...continued)

violations, not a “widespread and persisting” pattern of such violations. *Compare* Def. Mem. 29, 30, 33 (referring to alleged need to show “widespread and persisting” pattern of violations), *with Bd. of Trustees of the Univ. of Ala. v. Garrett*, 121 S. Ct. 955, 965 (2001) (“[W]e examine whether Congress identified a *history and pattern* of unconstitutional” conduct to be remedied) (emphasis added), *and CSX Transp., Inc. v. New York State Office of Real Prop. Servs.*, 306 F.3d 87, 97 (2d Cir. 2002) (same). In any event, as discussed further below, the congressional record meets even the higher standard that the Defendants would manufacture.

Similarly, Defendants have omitted the first part of the Enforcement Clause analysis, which is “to identify with some precision the scope of the constitutional right at issue.” *Garrett*, 121 S. Ct. at 963; *see id.* at 965 (“Once we have determined the metes and bounds of the constitutional right in question,” then the Court will examine “history and pattern” evidence); *see, e.g., Nanda v. Bd. of Trustees of the Univ. of Ill.*, 303 F.3d 817, 828 (7th Cir. 2002) (beginning application of Enforcement Clause test by examining constitutional rights to be enforced). Little wonder, for this step reveals just how faithfully Congress has restated current “individualized assessments” jurisprudence under the Free Exercise Clause in RLUIPA Section 2(a) – a fact that both deflates Defendants’ overblown rhetoric of congressional defiance, *see, e.g.,* Defs. Mem. 23-25, and highlights just how modest a remedy Section 2(a) really is. *See Freedom Baptist Church*, 204 F. Supp. 2d at 873 (concluding that, because “the statute draws the very line *Smith* itself drew when it distinguished neutral laws of general applicability from those ‘where the State has in place a system of individual exemptions,’” RLUIPA Section 2(a) “cannot be regarded as in any way hostile to *Smith*, as the RFRA undoubtedly was.”).

respects the Supreme Court’s recently invigorated interpretation of the Enforcement Clause and falls squarely within the bounds of that enumerated power.

Congress’ power “to enforce” the Fourteenth Amendment plainly includes the power to provide by legislation judicial remedies for constitutional violations in the narrow sense of monetary damages, injunctive relief, and attorneys’ fees. *See, e.g.*, 42 U.S.C. §§ 1983, 1988. In *Flores*, the Supreme Court reaffirmed a long line of cases holding that Section 5 *also* authorizes Congress to fashion legislation that “deters” or “prevent[s]” constitutional violations, “even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into ‘legislative spheres of autonomy previously reserved to the States.’”<sup>50</sup>

Although this power is “broad,” it does not authorize Congress “to decree the substance of the Fourteenth Amendment’s restrictions on the States,” or otherwise “to determine what constitutes a constitutional violation.” *Flores*, 521 U.S. at 518, 519; *CSX Transp., Inc. v. New York State Office of Real Prop. Servs.*, 306 F.3d 87, 96 (2d Cir. 2002). Therefore, “§ 5 legislation *reaching beyond* the scope of § 1’s actual guarantees must exhibit ‘*congruence and proportionality* between the injury to be prevented or remedied and the means adopted to that end.’” *Board of Trustees of Univ. of Ala. v. Garrett*, 121 S. Ct. 955, 963 (2001) (quoting *Flores*, 521 U.S. at 520) (emphasis added). More specifically, “[p]reventive measures prohibiting certain types of laws may be appropriate when there is reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional.” *Flores*, 521 U.S. at 532.

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<sup>50</sup>*Flores*, 521 U.S. at 518, 524 (quoting *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976)); *CSX Transp.*, 306 F.3d at 96 (same); *see Garrett*, 121 S. Ct. at 963 (“Congress is not limited to mere legislative repetition of this Court’s constitutional jurisprudence,” but may also prohibit “a somewhat broader swath of conduct”); *Nanda*, 303 F.3d at 826 (“[C]ongressional action taken pursuant to § 5 of the Fourteenth Amendment is not limited to parroting the language of § 1.”).

In sharp contrast to RFRA, RLUIPA readily satisfies this standard. First, far from redefining the substance of constitutional law, RLUIPA provisions based on the Enforcement Clause merely restate current First and Fourteenth Amendment standards. Second, RLUIPA’s legislative history contains an extensive factual record establishing that these standards are violated frequently and nationwide. Third, to the extent RLUIPA contains “preventive” or “deterrent” measures at all – that is, to the extent RLUIPA prohibits government action that is not already unconstitutional – those measures are “congruent” and “proportional” to the pervasive constitutional injuries Congress has identified. *Flores*, 521 U.S. at 520. Thus, Congress had ample “reason to believe that many of the laws affected by [RLUIPA] have a significant likelihood of being unconstitutional.” *Id.* at 532.

**1. RLUIPA precisely targets, according to current Supreme Court precedent, state and local land-use laws that are unconstitutional.**

RLUIPA provisions based on the Enforcement Clause affect only unconstitutional state and local land-use laws, because those RLUIPA provisions were designed to do little, if anything, more than codify current First and Fourteenth Amendment jurisprudence.

Specifically, where a land-use regulation involving “individualized assessments of the proposed uses for ... property” imposes a “substantial burden on ... religious exercise,” the parts of RLUIPA challenged here require a showing that the law furthers “a compelling governmental interest” using the “least restrictive means.” RLUIPA §§ 2(a)(1), 2(a)(2)(C). This merely restates in the land-use context the constitutional standard articulated most recently in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 537 (1993):

As we noted in *Smith*, in circumstances in which individualized exemptions from a general requirement are available, the government “may not refuse to extend that system to cases of ‘religious hardship’ without compelling reason.”

Every court to examine this portion of RLUIPA – including this very Court – has recognized Congress’ unmistakable attempt to codify, rather than flout, existing Free Exercise jurisprudence. *Freedom Baptist Church*, 204 F. Supp. 2d at 868 (“What Congress manifestly has done in this subsection [2(a)(1) and 2(a)(2)(C)] is to codify the individualized assessments jurisprudence in Free Exercise cases that originated with the Supreme Court’s decision in *Sherbert...*”); *id.* (“[L]and use regulations through zoning codes necessarily involve case-by-case evaluations of the propriety of proposed activity against extant land use regulations,” and so “impose individual assessment regimes.”); *id.* at 873 (concluding that, because “the statute draws the very line *Smith* itself drew when it distinguished neutral laws of general applicability from those ‘where the State has in place a system of individual exemptions,’” RLUIPA Section 2(a) “cannot be regarded as in any way hostile to *Smith*, as the RFRA undoubtedly was.”).<sup>51</sup> Indeed, Congress has made this purpose absolutely explicit in the legislative history of the Act.<sup>52</sup>

Rather than acknowledge this weight of authority, Defendants argue in a footnote that this standard does not apply outside the unemployment compensation context. *See* Defs. Mem. 28 n.7.

But the Supreme Court itself has applied this standard outside the unemployment context in *Lukumi*,

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51 *See also Hale O Kaula*, 229 F. Supp. 2d at 1072 (“Section [2(a)(2)](c) codifies the ‘individualized assessments’ doctrine, where strict scrutiny applies.”) (quoting *Lukumi*, 508 U.S. at 537); *Cottonwood Christian Center*, 218 F. Supp. 2d at 1221 (“To the extent that RLUIPA is enacted under the Enforcement Clause, it merely codifies numerous precedents holding that systems of individualized assessments, as opposed to generally applicable laws, are subject to strict scrutiny.”).

52 *See, e.g.*, 146 CONG. REC. S7775 (daily ed. July 27, 2000) (“The hearing record demonstrates a widespread practice of individualized decisions to grant or refuse permission to use property for religious purposes. These individualized assessments readily lend themselves to discrimination, and they also make it difficult to prove discrimination in any individual case.”); H.R. REP. NO. 106-219, at 17 (“Local land use regulation, which lacks objective, generally applicable standards, and instead relies on discretionary, individualized determinations, presents a problem that Congress has closely scrutinized and found to warrant remedial measures under its section 5 enforcement authority.”).

and the Third Circuit has explicitly recognized as much in *Fraternal Order of Police*.<sup>53</sup> Moreover, lower courts since *Smith* have routinely found land-use laws to represent systems of “individualized assessments,” because they are typically rife with exceptions and occasions for discretionary decision making.<sup>54</sup>

In short, because Section 2(a) so closely tracks First and Fourteenth Amendment standards, Congress did not just have a “reason to believe” – *but knew* – that not just “many” – *but virtually all* – of the state laws affected by this provision did not just “have a significant likelihood of being” – *but actually were* – unconstitutional. *Flores*, 521 U.S. at 532. The tight correspondence of legislative and constitutional standards puts to rest any claim that these RLUIPA provisions “alter the meaning of the Free Exercise Clause,” as RFRA did. *Id.* at 519.<sup>55</sup>

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<sup>53</sup> See *Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 364 (3d Cir. 1999) (acknowledging application of individualized assessments doctrine outside unemployment context in *Lukumi*). See also *Freedom Baptist Church*, 204 F. Supp. 2d at 873 (noting that RLUIPA “draws the very line *Smith* itself drew when it distinguished neutral laws of general applicability from those ‘where the State has in place a system of individual exemptions,’”); *Cottonwood Christian Center*, 218 F. Supp. 2d at 1222 (noting that *Smith* “left undisturbed the application of a strict scrutiny test to situations where there are ‘individualized governmental assessment[s].’”) (quoting *Smith*, 494 U.S. at 884).

<sup>54</sup> See, e.g., *Keeler v. Mayor of Cumberland*, 940 F. Supp. 879, 885-86 (D. Md. 1996); *Alpine Christian Fellowship v. County Comm’rs*, 870 F. Supp. 991, 994 (D. Colo. 1994); *Korean Buddhist Dae Won Sa Temple of Hawaii v. Sullivan*, 953 P.2d 1315, 1344 n.31 (Haw. 1998); *First Covenant Church of Seattle v. City of Seattle*, 840 P.2d 174, 181 (Wash. 1992). See also *Cottonwood Christian Center*, 218 F. Supp. 2d at 1222-23 (explaining how zoning laws typically represent systems of individualized assessments, discussing *Freedom Baptist Church*, 204 F. Supp. 2d at 868).

<sup>55</sup> The remaining provisions of RLUIPA at issue in this case – Sections 2(b)(1), 2(b)(2) and 2(b)(3)(b) – reflect a similarly close correspondence with current First and Fourteenth Amendment jurisprudence of the Supreme Court. See *Freedom Baptist Church*, 204 F. Supp. 2d at 869-71 (surveying “Other RLUIPA Codifications”). Because Section 2(b)(1) is not meaningfully challenged as unconstitutional, *see* Defs. Mem 29 n.8, the Congregation will not repeat the multiple, overlapping constitutional rights it is designed to codify. See *Kirschbaum v. WRGSB Assocs.*, 243 F.3d 145, 151 (3d Cir. 2001) (refusing to decide arguments “on their  
(continued...)”) (continued...)

**2. RLUIPA’s legislative history firmly establishes a “history and pattern” of constitutional violations caused by state and local land-use laws.**

Although the Defendants complain that the legislative history of RLUIPA fails to document a “widespread and persisting” pattern of unconstitutional zoning laws, the sheer length of their citations to that history (which, even then, only scratch the surface of the relevant evidence) should at least raise some initial doubts about the credibility of their claim. *See* Defs. Mem. 31-33. In fact, Congress has “compiled massive evidence,” 146 CONG. REC. S7774 – based on nine (9) hearings over a period of three (3) years – that clearly establishes what the RFRA record did not: a “widespread pattern of religious discrimination in this country” in land-use regulation, including “examples of legislation enacted *or* enforced due to animus or hostility to the burdened religious practices.” *Flores*, 521 U.S. at 531 (emphasis added). The congressional record reflects that land-use laws are commonly *both* enacted *and* enforced out of hostility to religion.<sup>56</sup> Congress found that

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merits since they are poorly briefed and deserve more development than passing mention in a footnote for us to take them seriously”). To the extent the Court would nonetheless consider the footnote challenge to Section 2(b)(1), the Congregation hereby incorporates by reference the argument in support of the constitutionality of that provision contained in *Freedom Baptist Church* and Storzer & Picarello, *The Religious Land Use and Institutionalized Persons Act of 2000: A Constitutional Response to Unconstitutional Zoning Practices*, 9 GEO. MASON L. REV. 929, 981-82, 985 n.391 (Summer 2001). The Township has not even hinted at constitutional challenges to Subsections 2(b)(2) and 2(b)(3)(B).

<sup>56</sup>*Compare* 146 CONG. REC. S7774 (“Churches in general, and new, small, or unfamiliar churches in particular, are frequently discriminated against *on the face* of zoning codes.”) (emphasis added), *and* Laycock, *State RFRA’s and Land Use Regulation*, 32 U.C. DAVIS L. REV. 755, 773 (1999) (discussing examples from congressional record of “evidence of discrimination *in the zoning codes themselves*”) (emphasis added), *with* 146 CONG. REC. S7774 (“Sometimes, zoning board members or neighborhood residents explicitly offer race or religion as the reason to exclude a proposed church, especially in cases of black Churches and Jewish shuls and synagogues. More often, discrimination lurks behind such vague and universally applicable reasons as traffic, aesthetics, or ‘not consistent with the city’s land use plan.’”).

discriminatory *application* of zoning laws is particularly common because, as here, zoning laws across the country are overwhelmingly discretionary; in other words, the “generally applicable” laws described in *Smith* are uncommon in the land-use context.<sup>57</sup>

These findings were backed by evidence that was presented to Congress in various forms, which were cumulative and mutually reinforcing. Some evidence was statistical, including national surveys of churches, zoning codes, and public attitudes.<sup>58</sup> Some was judicial, including “decisions

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<sup>57</sup> See 146 CONG. REC. S7775 (daily ed. July 27, 2000) (“The hearing record demonstrates a widespread practice of individualized decisions to grant or refuse permission to use property for religious purposes. These individualized assessments readily lend themselves to discrimination, and they also make it difficult to prove discrimination in any individual case.”); H.R. REP. NO. 106-219, at 17 (“Local land-use regulation, which lacks objective, generally applicable standards, and instead relies on discretionary, individualized determinations, presents a problem that Congress has closely scrutinized and found to warrant remedial measures under its section 5 enforcement authority.”). See also *Cottonwood Christian Center*, 218 F. Supp. 2d at 1224 (noting that once the city “vest[ed] absolute discretion in a single person or body ...” “[t]hat decision-maker would then [be] free to discriminate against religious uses and exceptions with impunity, without any judicial review.”).

<sup>58</sup> Though the Defendants take pains to cite the *single* study that backs their (and their lobbyists’) view of the discrimination landscape, see Defs. Mem. 33, the Defendants notably omit the *multiple* studies *actually* in the legislative record, on which Congress *actually* (and reasonably) relied. See, e.g., *Protecting Religious Freedom after Boerne v. Flores (III)*, Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary, 105th Cong., 2d Sess., at 127-54 (Mar. 26, 1998) (statement of Von Keetch, Counsel to Mormon Church, <[http://commdocs.house.gov/committees/judiciary/hju57227.000/hju57227\\_of.htm](http://commdocs.house.gov/committees/judiciary/hju57227.000/hju57227_of.htm)>) (“Keetch Statement”) (summarizing and presenting findings of Brigham Young University study of religious land use conflicts); *Religious Liberty Protection Act of 1998: Hearing on H.R. 4019 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105<sup>th</sup> Cong., 2d Sess., at 364-75 (June 16 and July 14, 1998) (“June-July 1998 House Hearings”) (statement of Rev. Elenora Giddings Ivory, Presbyterian Church (USA), <[http://commdocs.house.gov/committees/judiciary/hju59929.000/hju59929\\_of.htm](http://commdocs.house.gov/committees/judiciary/hju59929.000/hju59929_of.htm)>) (discussing survey by Presbyterian Church (USA) of zoning problems within that denomination); *id.* at 405, 415-16 (statement of Prof. Douglas Laycock, Univ. Texas Law Sch.) (discussing Gallup poll data indicating hostile attitudes toward religious minorities) (“Laycock Statement”); John W. Mauck, *Tales from the Front: Municipal Control of Religious Expression Through Zoning Ordinances*, at 7-8 (July 9, 1998) (statement submitted to Congress, <<http://www.house.gov/judiciary/mauck.pdf>>, to supplement live testimony of June 16, 1998) (“Mauck Statement”) (compiling zoning provisions  
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of the courts of the States and ... the United States [reflecting] extensive litigation and discussion of the constitutional violations.”<sup>59</sup> *Garrett*, 121 S. Ct. at 968 (Kennedy, J., concurring). Some was anecdotal evidence *paired with* testimony by experienced witnesses indicating that the anecdotes were representative.<sup>60</sup> *Cf. Garrett*, 121 S. Ct. at 965 (finding “half a dozen examples from the record” insufficient *by themselves* to establish pattern of constitutional violation). This Court should reject Defendants’ attempt to diminish this formidable evidentiary record by citing only part of it and claiming it is the whole.<sup>61</sup>

Some of the evidence before Congress warrants emphasis for its particular relevance to this case:

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affecting churches in 29 suburbs of northern Cook County).

Nor is there a “gaping hole” in the record for lack of opposing views, Defs. Mem. 33, which were expressed to Congress by, among others, Attorney Hamilton, who represents the Township in this case. *See, e.g.*, June-July 1998 House Hearings, at 91-110 (statements of Marci Hamilton).

<sup>59</sup> *See* Keetch Statement, at 131-53 (listing numerous state and federal zoning cases involving religious assemblies).

<sup>60</sup> *See, e.g.*, Mauck Statement, at 1-5 (describing 22 representative cases based on 25 years experience representing churches in land-use disputes); June-July 1998 House Hearings, at 360-64 (statement of Bruce D. Shoulson, attorney) (describing experiences representing Jewish congregations in land-use disputes, and concluding that “the implications of these examples, which I believe are not unique, are obvious, and the need for assurances to Americans of all faiths that they will be free to exercise their religions should be equally obvious”). *See also* 146 CONG. REC. E1564-E1567 (Sept. 22, 2000) (listing 19 additional instances of land-use burdens on religious exercise arising since conclusion of hearings).

<sup>61</sup> The evidence presented to Congress is also available in summary form in Douglas Laycock, *State RFRA's and Land Use Regulation*, 32 U.C. DAVIS L. REV. 755, 769-83 (1999) and *Protecting Religious Liberty: Hearings Before the Senate Comm. on the Judiciary*, 106<sup>th</sup> Cong., 2d Sess. (Sept. 9, 1999), (statement of Prof. Douglas Laycock, Univ. Texas Law Sch., <<http://www.senate.gov/~judiciary/9999dlay.htm>>). In addition, the Keetch study is published in Von G. Keetch & Matthew K. Richards, *The Need for Legislation to Enshrine Free Exercise in the Land Use Context*, 32 U.C. DAVIS L. REV. 725 (1999).

- The Brigham Young University study indicated that religious minorities, and especially Jews, are vastly overrepresented in religious land use litigation, even controlling for the merits of the case. Specifically, religious minorities representing 9% of the population are involved in 49% of reported religious land-use disputes over a principal use, but win in court at the same rate as mainline religious groups. Self-identified Jews of all denominations represent about 2.2% of the population, but were involved in 20% of reported principal use cases. *See Keetch Statement, supra*, at 118, 127-30; Laycock Statement, *supra*, at 411.
- This pattern of decisions reflects broader public attitudes to religious minorities, as reported in the Gallup poll presented to Congress. Specifically, 86% of Americans admit mostly unfavorable or very unfavorable attitudes toward religions they categorize as “sects ” or “cults,” and 45% of Americans hold mostly or very unfavorable opinions of those termed “fundamentalists.” When asked whether they would want to have these same groups as neighbors, 62% and 30% of Americans, respectively, would not. Laycock Statement, *supra*, at 415.
- According to John Mauck, a leading religious land-use attorney in Chicago, 30% of all cases before the city’ s Zoning Board of Appeals involved houses of worship, even though that type of use does not remotely approach 30% of the land uses in the city. Laycock Statement, *supra*, at 414.

Thus, the Court should simply disregard the Township’ s conclusory assertion that the record reflects only “short string of land-use anecdotes,” Defs. Mem. 30, and find it instead to reflect a “history and pattern ” of unconstitutional land-use regulations. *Garrett*, 121 S. Ct. at 965.

**3. To the extent RLUIPA “prevents” or “deters” constitutional injuries, it employs “congruent” and “proportional” means to that end.**

The prohibitions of RLUIPA based on the Enforcement Clause correspond so closely to current First and Fourteenth Amendment jurisprudence that they scarcely require justification as “preventive” or “deterrent” measures that trigger the congruence / proportionality inquiry under *Flores*. *See Garrett*, 121 S. Ct. at 963 (noting that “§ 5 legislation *reaching beyond* the scope of § 1’ s actual guarantees must exhibit ‘congruence and proportionality....’”) (emphasis added). Rather than “prohibit[] conduct which is not itself unconstitutional,” *Flores*, 521 U.S. at 518, Section 2(a)

merely restates a frequently violated constitutional standard and provides familiar judicial remedies for that violation.

Specifically, RLUIPA provides a federal cause of action for “appropriate relief,” including attorneys’ fees, RLUIPA § 4(a), (d). Even the burden shifting provision of the Act, RLUIPA § 4(b), reflects existing Supreme Court jurisprudence regarding the respective burdens of plaintiff and defendant once strict scrutiny is triggered.<sup>62</sup> Notably, not one of these remedies remotely “alters the meaning of the Free Exercise Clause.” *Flores*, 521 U.S. at 519.

Moreover, these remedies apply only in the area of “land use regulation,” which the statute defines quite narrowly as “a zoning or landmarking law,” RLUIPA § 8(5), and where enforcement is amply justified by the congressional record. *See supra* Section II.B. RFRA, by contrast, applied to all areas of law, and so was faulted for “[s]weeping coverage ... displacing laws and prohibiting official actions of almost every description and regardless of subject matter.” *Flores*, 521 U.S. at 532.

Also unlike RFRA, RLUIPA applies the compelling interest test pursuant to the Enforcement Clause power *only* where land-use laws involve “individualized assessments,” *i.e.*, where the compelling interest standard *already applies*. Compare RLUIPA § 2(a)(2)(C), with *Lukumi*, 508 U.S. at 537.<sup>63</sup> Codifying the Supreme Court’s constitutional standard to facilitate its enforcement

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<sup>62</sup>*See, e.g., Republican Party of Minn. v. White*, 122 S.Ct. 2528, 2535 (2002) (“Under the strict-scrutiny test, [the defendants] have the burden to prove that the [challenged action] is (1) narrowly tailored, to serve (2) a compelling state interest.”); *Miller v. Johnson*, 515 U.S. 900, 920 (1995) (“To satisfy strict scrutiny, the State must demonstrate that its [action] is narrowly tailored to achieve a compelling interest.”).

<sup>63</sup> To the extent that RLUIPA applies the compelling interest standard to substantially burdensome land-use laws that do *not* involve “individualized assessments,” RLUIPA does *not* rely on (continued...)

simply cannot be a disproportionate means of enforcing that standard. *See* 146 CONG. REC. S7775 (“Each subsection closely tracks the legal standards in one or more Supreme Court opinions, codifying those standards for greater visibility and easier enforceability.”).

But even if RLUIPA occasionally prohibits more land-use regulation than the Constitution already does, that would not jeopardize the constitutionality of the Act. *See, e.g., Freedom Baptist Church*, 204 F. Supp. 2d at 874 (“To the extent that, conceivably, the RLUIPA may cover a particular case that is not on all fours with an existing Supreme Court decision, it nevertheless constitutes the kind of congruent and, above all, proportional remedy Congress is empowered to adopt under § 5 of the Fourteenth Amendment.”). *See also Garrett*, 121 S. Ct. at 963 (“Congress is not limited to mere legislative repetition of this Court’s constitutional jurisprudence,” but may also prohibit “a somewhat broader swath of conduct”).

In sum, having identified widespread and substantial constitutional injuries to religious liberty in the area of land-use regulation, Congress passed RLUIPA to codify those precise constitutional standards and to provide judicial remedies – in the narrowest sense – for violations of those standards. To the extent RLUIPA’s provisions are “preventive” or “deterrent” at all, they are “congruent” and “proportional” to the constitutional injuries targeted. RLUIPA thus contrasts sharply with the “sweeping coverage” of RFRA, and so falls well within the boundaries of Congress’ Enforcement Clause authority, as defined in *Flores* and *Garrett*. Therefore, Defendants’ Motion for

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(...continued)

Enforcement Clause authority. Instead, in those unusual cases, the compelling interest standard applies *only* if the facts of the case authorize congressional action under the Commerce or Spending Clauses of Article I. *See* RLUIPA § 2(a)(2)(A) (application based on commerce power); *id.* § 2(a)(2)(B) (application based on spending power). In cases where none of the three jurisdictional elements is satisfied, *see* § 2(a)(2)(A)-(C), the “substantial burdens” test of Section 2(a)(1) simply does not apply at all.

Summary Judgment against Plaintiffs' RLUIPA claims on Enforcement Clause grounds should be denied.

**C. RLUIPA Section 2(a) Is a Proper Exercise of Congress' Enumerated Power Under the Commerce Clause of Article I.**

Defendants next claim that Congress lacked the authority under the Commerce Clause to pass RLUIPA Section 2(a). *See* Def. Mem. 35-39. That provision, however, contains an “express jurisdictional element,” and regulates “economic activity” – namely, burdens on the use and development of land – whose connection to interstate commerce is not “attenuated,” but “visible to the naked eye.” *See United States v. Lopez*, 514 U.S. 549, 561-63 (1995); *United States v. Morrison*, 529 U.S. 598, 608-13 (2000). Therefore, Defendants' Commerce Clause challenge to RLUIPA Section 2(a) should be rejected.

The Supreme Court recently clarified the factors courts should consider when assessing whether congressional legislation represents “regulation of an activity that substantially affects interstate commerce,” *Lopez*, 514 U.S. at 559: (1) whether the statute contains an express “jurisdictional element which would ensure, through case-by-case inquiry, that the [regulated activity] in question affects interstate commerce,” *Lopez*, 514 U.S. at 561; *Morrison*, 529 U.S. 611-12; (2) whether the statute regulates “economic activity,” *Lopez*, 514 U.S. at 559; *Morrison*, 529 U.S. at 610; (3) whether “the link between [the regulated activity] and a substantial effect on interstate commerce was attenuated,” *Morrison*, 529 U.S. at 612 (citing *Lopez*, 514 U.S. at 563-67); and (4) whether the statute's “legislative history contain[s] express congressional findings regarding the effects upon interstate commerce,” *Morrison*, 529 U.S. at 612 (quoting *Lopez*, 514 U.S. at 562).

*See United States v. Griffith*, 284 F.3d 338, 346 (2d Cir. 2002). Although legislation need not satisfy every single factor, and no single factor is strictly required, all are satisfied here.

**1. RLUIPA contains an “express jurisdictional element.”**

First and foremost, in contrast to the laws at issue in *Lopez* and *Morrison*, Section 2(a) of RLUIPA is supported by an “express jurisdictional element which might limit its reach to a discrete set of [burdens on land use] that additionally have an explicit connection with or effect on interstate commerce.” *Morrison*, 529 U.S. at 611-12; *see* RLUIPA § 2(a)(2)(B). As a matter of law and logic, the presence of this provision ensures the *facial* constitutionality of the statute under the Commerce Clause: by its own terms, the statute applies only to conduct affecting “commerce with foreign nations, among the several States, or with Indian tribes.”<sup>64</sup> The jurisdictional element also precludes *as-applied* challenges under the Commerce Clause. If the conduct at issue in a particular case satisfies the jurisdictional requirement of Section 2(a)(2)(B), then the conduct also falls within the sweep of the commerce power and may be regulated constitutionally; if the facts do not satisfy the jurisdictional element, then the constitution *would* prohibit the statute from reaching the conduct under the commerce power, but those are the same cases where the statute does not reach the conduct, so constitutional boundaries are never crossed.<sup>64</sup> In other words, the Act applies either

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<sup>64</sup>*Compare* RLUIPA § 2(a)(2)(B), *with* U.S. CONST. Art. I, § 8, cls. 3; *see United States v. Bishop*, 66 F.3d 569, 588 (3d Cir. 1995) (“[T]he jurisdictional element in [the federal carjacking statute] independently refutes appellants’ arguments that the statute is constitutionally infirm.”). *See also United States v. Chesney*, 86 F.3d 564, 568-69 (6<sup>th</sup> Cir. 1996) (concluding “presence of the jurisdictional element defeats [defendant’s] facial challenge”); *United States v. Sorrentino*, 72 F.3d 294, 296 (2d Cir. 1995) (“The statute before us avoids the constitutional deficiency identified in *Lopez* because it requires a legitimate nexus with interstate commerce” by means of a jurisdictional element.).

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constitutionally, or not at all. This has proven sufficient alone for courts to reject Commerce Clause challenges to both RLUIPA Section 2(a)(2)(b), and the analogous prisoner provision, Section 3(b)(2).<sup>65</sup>

## 2. RLUIPA regulates “economic activity.”

If the Court deems it necessary to reach the second factor in the Commerce Clause analysis, the Court should find it satisfied. RLUIPA, by its very terms, regulates “economic activity”: burdens on the use and development of real property, where the burdens also affect interstate commerce. *See Freedom Baptist Church*, 204 F. Supp. 2d at 867-68 (concluding that “insofar as state or local authorities ‘substantially burden’ the economic activity of religious organizations, Congress has ample authority to act under the Commerce Clause”); RLUIPA §§ 2(a)(2)(B), 8(5).

The decision of this District in *Freedom Baptist Church* finding RLUIPA to regulate “economic activity” is reinforced by a recent decision of the Fifth Circuit Court of Appeals concluding that congressional regulation of local zoning laws to combat housing discrimination fell within the commerce power, based in part on a finding that Congress was regulating “economic activity.” *Groome Resources Ltd. v. Parish of Jefferson*, 234 F.3d 192, 205-206 (5<sup>th</sup> Cir. 2000)

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<sup>65</sup> *See, e.g., Hale O Kaula*, 229 F. Supp. 2d at 1072 (concluding that “jurisdictional element” of § 2(a)(2)(B) precludes Commerce Clause challenge); *Johnson*, 223 F. Supp. 2d at 828 (“RLUIPA is saved by its jurisdictional requirement which establishes the requisite nexus to interstate commerce to satisfy the Commerce Clause.”); *Mayweathers v. Terhune*, 2001 WL 804140, at \*7-\*8 (E.D. Cal. July 2, 2001) (“The jurisdictional element in § 3(b)(2) thereby ensures that Congress’ Commerce Clause power is only exercised in those cases where interstate commerce is directly affected by the prison regulation at issue.”). *See also Freedom Baptist Church*, 204 F. Supp. 2d at 867 (“As subsection (a)(2)(B) on its face has an interstate commerce jurisdictional element, defendants are reduced to question, as they do, the Congressional findings here....”).

(upholding constitutionality of Fair Housing Amendments Act.) The court reasoned that “an act of discrimination that directly interferes with a commercial transaction” – there, the purchase, sale, or rental of residential property – “is an act that can be regulated to facilitate an economic activity.” *Id.* at 205-06. The development of land, especially involving construction of new driveways and parking lots and the rehabilitation of the buildings as here, is at least as “commercial” or “economic” as the purchase or sale of that land. Indeed, the legislative history of RLUIPA repeatedly identifies the “construction project” as an example of “a specific economic transaction in commerce” that discriminatory land-use regulations may burden. 146 CONG. REC. S7775; H.R. REP. 106-219, at 28.

Moreover, the purchase, sale, rental, development or use of land is no less an “economic activity” when undertaken by a religious group or other non-profit organization.<sup>66</sup> Courts have consistently held that the commercial activities of religious institutions are subject to regulation under the Commerce Clause.<sup>67</sup> If commercial activities of religious entities fall within the commerce power when Congress would regulate them, they cannot fairly be said to fall beyond that power when

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<sup>66</sup> See *Camps Newfound / Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 585 (1997) (“Nothing intrinsic to the nature of nonprofit entities prevents them from engaging in interstate commerce.”); H.R. REP. NO. 106-219, at 28 (noting that predecessor bill of RLUIPA “does not treat religious exercise itself as commerce,” but “recognizes that the exercise of religion sometimes requires commercial transactions, such as the construction of churches.”); see, e.g., *Grassie*, 237 F.3d at 1210 (“Religion and in particular religious buildings actively used as the site and dynamic for a full range of activities, easily falls within” the commerce power.); *id.* at 1209 (listing among common church activities that affect interstate commerce “social services, educational and religious activities, the purchase and distribution of goods and services, civil participation, and the collection and distribution of funds for these and other activities across state lines”); *Cottonwood Christian Center*, 218 F. Supp. 2d at 1221-22 (listing commercial activities of churches).

<sup>67</sup> See, e.g., *Tony & Susan Alamo Fdn. v. Sec’y of Labor*, 471 U.S. 290 (1985) (finding religious foundation to be an “[e]nterprise engaged in commerce or in the production of goods for commerce” under Fair Labor Standards Act); *Volunteers of America v. NLRB*, 777 F.2d 1386, 1389 (9<sup>th</sup> Cir. 1985) (noting that nonprofit charitable employers are subject to National Labor Relations Act when they affect commerce, and finding statute to cover church-operated alcohol rehabilitation center).

Congress would exempt them from regulation.<sup>68</sup> Therefore, unlike the statutes at issue in *Lopez* and *Morrison*, both of which pertained to violent crime, RLUIPA regulates “economic activity.”

Defendants nevertheless complain that when local governments act “in their sovereign capacity,” their action is never “economic activity” subject to Commerce Clause regulation, even when those actions interfere with commercial transactions. *See* Def. Mem. 36-39. The Town relies primarily on *Printz v. United States*, 521 U.S. 898 (1997), but that case does not support such an extreme proposition. The regulation in *Printz* was struck down under the Tenth Amendment because it commandeered state and local officials to administer a new, federal system of firearm registration and background checks. Here, by contrast, Congress has invoked the commerce power to create a single parameter on a small subset of local government actions – zoning and land-marking decisions that substantially burden religious exercise – and only where those decisions interfere with interstate commerce. RLUIPA does not require state or local government to pass laws or regulations, or to administer a new federal regulatory scheme; instead, it simply limits certain local government actions *once they tread into federal territory*. *See Freedom Baptist Church*, 204 F. Supp. 2d at 867 (“[T]he mere fact that zoning is traditionally a local matter does not answer Congress's undoubtedly broad authority after *Wickard* to regulate economic activity even when it is primarily intrastate in nature.”). Far from being anomalous or unique, Section 2(a) is typical of Commerce Clause regulation that constrains (but does not “take over,” *see* Defs. Mem. 24, 26, 37) the zoning power

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<sup>68</sup> *See, e.g., Camps Newfound/Owatonna*, 520 U.S. at 583-87 (holding Dormant Commerce Clause invalidates state real estate tax imposing discriminatory burden on economic activity of small church camp).

of local governments, such as the Telecommunications Act of 1996 and the Fair Housing Amendments Act of 1988.<sup>69</sup> Thus, the Town’s arguments based on *Printz* should be rejected.<sup>70</sup>

**3. RLUIPA regulates a class of activity having a direct, rather than an “attenuated,” link to interstate commerce**

Third, there can be little doubt that this class of economic activity has a direct link to interstate commerce. Even after *Lopez* and *Morrison*, courts will measure interstate effect by examining the activity at issue “taken together with that of many others similarly situated.”<sup>71</sup> But

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<sup>69</sup>*See, e.g., Groome Res. Ltd.*, 234 F.3d at 205-06 (upholding FHAA based in part on conclusion that “an act of discrimination that directly interferes with a commercial transaction” – there, the purchase, sale, or rental of residential property – “is an act that can be regulated to facilitate an economic activity”); *Freedom Baptist Church*, 204 F. Supp. 2d at 867 (noting that Telecommunications Act “specifically governs state and local authorities passing upon zoning requests of wireless providers without (to date) any judicially-recognized constitutional objection”). *See also id.* (“Nor is this the first time Congress has entered the zoning arena.”); Salkin, *Smart Growth and Sustainable Development: Threads of a National Land Use Policy*, 36 VAL. U. L. REV. 381, 388 (Spring 2002) (providing additional examples from the “host” or “litany of federal laws and implementing regulations [that] affect and restrict state and local land use decision making.”).

<sup>70</sup> The Township includes what appears to be a distinct Tenth Amendment argument within its Commerce Clause argument. *See* Defs. Mem. 38. To the extent it represents a distinct challenge to RLUIPA, it, too, must fail. The limits of the Tenth Amendment are implicated only when Congress acts outside the scope of its enumerated powers. *New York v. United States*, 505 U.S. 144, 156 (1992) (“If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States.”); *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (“As long as it is acting within the powers granted it under the Constitution, Congress may impose its will on the States.”). As detailed above, RLUIPA Section 2(a) represents a proper exercise of two, independently sufficient, enumerated powers of Congress, the enforcement power and the commerce power. *See supra* Sections III.A, III.B. Thus, any distinct Tenth Amendment challenge to RLUIPA has no merit. *See, e.g., Mayweathers*, 314 F.3d at 369 (rejecting Tenth Amendment challenge); *Johnson*, 223 F. Supp. 2d at 832-33 (same); *Gerhardt*, 221 F. Supp. 2d at 850-51 (same); *Charles*, 220 F. Supp. 2d at 966 (same).

<sup>71</sup> *Lopez*, 514 U.S. at 556 (quoting *Wickard v. Filburn*, 317 U.S. 111, 127-28 (1942)); *see, e.g., Camps Newfound / Owatonna, Inc.*, 520 U.S. at 586 (relying on “interstate commercial activities of nonprofit entities *as a class*” in Commerce Clause determination, citing *Lopez* and *Wickard*) (emphasis added); *Freedom Baptist Church*, 204 F. Supp. 2d at 867 & nn.12, 14

(continued...)

even these aggregated effects may fall beyond the commerce power if they are “so indirect and remote that to embrace them ... would effectually obliterate the distinction between what is national and what is local.” *Lopez*, 514 U.S. at 557 (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)).

Here, the Congregation has shown that the Township has imposed the substantial burden of prohibiting both the use of the Property as a synagogue, and the one-time rehabilitation and construction that is a predicate to that use. *See* Factual Statement, Section F. That burden *directly stifles* the multiple, large-scale, commercial activities necessary to complete the construction and rehabilitation project in the short run: employing construction workers, purchasing and transporting building materials and supplies, raising and transferring funds, entering contracts, and others. Just as surely, the burden precludes smaller-scale but longer-term economic activities associated with mere use of the improvements: employment of maintenance workers and any additional paid staff for activities there, as well as ongoing purchase and consumption of supplies and utilities. *Id.*

There can be little doubt that these burdens, “taken together with ... many others similarly situated,” would “substantially affect interstate commerce.” *Lopez*, 514 U.S. at 556, 559. In fact, the effect on commerce of the ongoing *use* of the Property alone – not to mention *construction* on it – is enough to bring this case within the sweep of the commerce power. *See United States v. Grassie*, 237 F.3d 1199, 1210 (10<sup>th</sup> Cir. 2001) (“Religion and, in particular religious buildings actively *used* as the site and dynamic for a full range of activities, easily falls within” the commerce

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(...continued)

(discussing “continued vitality” of *Wickard’s* aggregation principle, and its incorporation into the text of RLUIPA).

power) (emphasis added).<sup>72</sup> Even if every commercial transaction suppressed in the instant case would have occurred exclusively in the State of Pennsylvania – unlikely though that may be – the aggregate effect of similar suppression elsewhere would still implicate the commerce power.<sup>73</sup> By contrast, the regulated activity in *Lopez* – possessing a gun in a school zone – was not one “that might, through repetition elsewhere, substantially affect any sort of interstate commerce.” *Lopez*, 514 U.S. at 567.

Moreover, this Court need not “pile inference upon inference,” *Lopez*, 514 U.S. at 567, to get from the regulated category of activity to an effect on interstate commerce: the application of land-use restrictions *directly and immediately* prohibits a full range of commercial transactions, including the sale, improvement, rental, and use of land.<sup>74</sup>

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<sup>72</sup> See, e.g., *United States v. Rayborn*, 312 F.3d 229 (6<sup>th</sup> Cir. 2002). See also *Johnson*, 223 F. Supp. 2d at 829 (describing the free exercise of religion as “objectively interstate activity,” and finding that it “affects interstate commerce in a multitude of ways”); *Cottonwood Christian Center*, 218 F. Supp. 2d at 1221-22 (discussing facts sufficient to bring church activity within sweep of Commerce Clause, distinguishing *construction* activities from *use* activities).

<sup>73</sup> See, e.g., *Camps Newfound / Owatonna*, 520 U.S. at 586 (“[A]lthough the [Christian Scientist] summer camp involved in this case may have a relatively insignificant impact on the commerce of the entire Nation, the interstate commercial activities of nonprofit entities as a class are unquestionably significant.”). See also *Johnson*, 223 F. Supp. 2d at 829 n.8 (noting the continuing viability of the aggregation principle of *Wickard v. Filburn*, and noting its codification in RLUIPA § 4(g)); *Freedom Baptist Church*, 204 F. Supp. 2d at 867 & nn.12, 14 (same). Cf. *Johnson*, 223 F. Supp. 2d at 829 (“RLUIPA covers regulation of the free exercise of religion, an objectively interstate activity.”).

<sup>74</sup> See *Groome Resources*, 234 F.3d at 213 (noting that “the connection between racial discrimination and its effect on interstate commerce had been established by [the Supreme Court] in *Heart of Atlanta Motel* and *McClung*.”). See, e.g., *Cottonwood Christian Center*, 218 F. Supp. 2d at 1221-22 (detailing commercial activities directly prohibited by application of land-use regulation).

Finally, applying RLUIPA here does not remotely threaten “the distinction between what is national and what is local.” *Lopez*, 514 U.S. at 557, 567. RLUIPA neither replaces zoning and land-marking systems with a federal one (as noted above), nor provides religious uses a blanket exemption from such systems. Instead, Section 2(a) requires local authorities to provide *additional justification* for a *limited category* of zoning and land-marking laws, namely, those that *both* substantially burden religious exercise *and* tread into national territory by affecting interstate commerce. *See Freedom Baptist Church*, 204 F. Supp. 2d at 867-68 (concluding that “insofar as state or local authorities ‘substantially burden’ the economic activity of religious organizations, Congress has ample authority to act under the Commerce Clause”).<sup>75</sup>

**4. RLUIPA’s legislative history contains evidence that the regulated activity “substantially affects interstate commerce.”**

Both *Lopez* and *Morrison* make clear that Congress is not generally required to make formal findings of the regulated activity’s effect on interstate commerce. *Morrison*, 519 U.S. at 612 (quoting *Lopez*, 514 U.S. at 562). Instead, congressional findings may help courts assess whether the effect is substantial when “no such substantial effect [is] visible to the naked eye.” *Id.* (quoting *Lopez*, 514 U.S. at 563). Because the substantial effect on commerce of the regulated activity here is abundantly “visible,” *see supra*, Section III.B.3., the Court need not rely on congressional findings to conclude that Congress has acted within its bounds.

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<sup>75</sup> *See also Camps Newfound / Owatonna*, 520 U.S. at 574-75 (rejecting argument that dormant Commerce Clause cannot invalidate discriminatory state real estate tax because Congress cannot impose real estate tax itself); *Groome Resources*, 234 F.3d at 215 (rejecting “incantation of ‘local zoning’ and ‘traditional’ authority,” because “it does not serve the balance of federalism to allow local communities to discriminate against the disabled”); *Freedom Baptist Church*, 204 F. Supp. 2d at at 867 (“[T]he mere fact that zoning is traditionally a local matter does not answer Congress's undoubtedly broad authority after *Wickard* to regulate economic activity even when it is primarily intrastate in nature.”).

Nevertheless, Congress still found in RLUIPA’s legislative history that the particular type of burden on religious land use at issue here – a “construction project” – substantially affect interstate commerce. *See* legislative history cited *supra*, Section III.B.2. These findings, moreover, are based on extensive testimony, studies, and other evidence indicating the nationwide magnitude of the commercial activity of religious institutions, in construction and otherwise. For example, according to one study cited, in 1992 alone, religious communities spent \$6 billion on capital investments and new construction, up from \$4.8 billion five years earlier.<sup>76</sup> Paired with the substantial evidence of widespread discriminatory land-use regulation discussed above, *see supra* Section III.A.2, Congress had far more than a “rational basis . . . for concluding that [such regulation] sufficiently affected interstate commerce.” *Lopez*, 514 U.S. at 557. Because the application of RLUIPA here satisfies all four factors of the *Lopez-Morrison* analysis, this Court should reject the argument that Plaintiffs’ RLUIPA claim exceeds the commerce power.

**D. RLUIPA Section 2(a) Does Not Violate the Establishment Clause of the First Amendment**

Finally, Defendants claim that RLUIPA Section 2(a) violates the Establishment Clause of the First Amendment. *See* Defs. Mem. 39-42. This represents a radical position held by only one sitting Justice of the Supreme Court. *See City of Boerne v. Flores*, 521 U.S. 507, 536-37 (1997) (Stevens, J., concurring). *See also Freedom Baptist Church*, 204 F. Supp. 2d at 863-65 (describing implicit rejection of Stevens’ position by remaining eight Justices). Notably, this same argument was recently rejected by the Ninth Circuit Court of Appeals (the same court that recently read the Establishment Clause to prohibit the voluntary recitation of the Pledge of Allegiance in public

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<sup>76</sup> *See, e.g.*, June-July 1998 House Hearings, at 125, 134 (statement of Marc D. Stern, American Jewish Congress) (“Stern Statement”); 146 CONG. REC. S7775 (citing Stern Statement in support of Commerce Clause authority).

schools) and has never been adopted by the ACLU (a friend to many Establishment Clause claimants, yet one of the strongest advocates of RLUIPA). Accordingly, not only has this argument been consistently rejected as against RLUIPA<sup>77</sup> but against RLUIPA's broader predecessor, RFRA;<sup>78</sup> and against local land-use laws that are similarly designed to avoid unnecessary burdens on religious exercise.<sup>79</sup> True to form, the Township cites *not a single one* of these decisions in its Establishment Clause argument.

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<sup>77</sup> *See, e.g., Mayweathers*, 314 F.3d at 1068-69 (rejecting Establishment Clause challenge to RLUIPA); *Johnson*, 223 F. Supp. 2d at 823-27 (same); *Gerhardt*, 221 F.Supp.2d at 832, 846-49 (same); *Charles*, 220 F. Supp. 2d at 966-69 (same); *Freedom Baptist Church*, 204 F. Supp. 2d at 863-65 & n.9(same).

<sup>78</sup> *See, e.g., In re Young*, 141 F.3d 854, 863 (8th Cir.) (“RFRA fulfills each of the elements presented in the *Lemon* test, and we conclude that Congress did not violate the Establishment Clause in enacting RFRA.”), *cert. denied*, 525 U.S. 811 (1998); *E.E.O.C. v. Catholic Univ. of America*, 83 F.3d 455, 470 (D.C. Cir. 1996) (“We agree with the Fifth Circuit that RFRA represents nothing more sinister than a ‘legislatively mandated accommodation of the exercise of religion.’”); *Flores v. City of Boerne*, 73 F.3d 1352, 1364 (5<sup>th</sup> Cir. 1996) (“RFRA’s lifting of ‘substantial burdens’ on the exercise of religion does not amount to the Government coercing religious activity through ‘its own activities and influence.’”), *rev’d on other grounds*, 521 U.S. 507; *Sasnett v. Sullivan*, 91 F.3d 1018, 1022 (7<sup>th</sup> Cir. 1996) (“We defer to the Fifth Circuit’s analysis of why [RFRA] also does not violate ... the establishment clause of the First Amendment.”), *vacated on other grounds*, 521 U.S. 1114 (1997). *See also Adams v. C.I.R.*, 170 F.3d 173, 175 n.1 (3d Cir. 1999) (“In general, courts that have addressed the question of constitutionality have found that RFRA is constitutional as applied to the federal government.”); Thomas C. Berg, *The Constitutional Future of Religious Freedom Legislation*, 20 U. ARK. LITTLE ROCK L.J. 715, 727-748 (1998) (arguing that RFRA is constitutional as applied to the federal government).

<sup>79</sup> *See Ehlers-Renzi v. Connelly School of the Holy Child*, 224 F.3d 283, 291 (4<sup>th</sup> Cir. 2000) (upholding county zoning ordinance exempting from special exception requirement parochial schools located on land owned by religious organization); *Boyajian v. Gatzunis*, 212 F.3d 1 (1<sup>st</sup> Cir. 2000) (upholding state law and town by-law prohibiting municipal authorities from excluding religious uses of property from any zoning area); *Cohen v. Des Plaines*, 8 F.3d 484 (7<sup>th</sup> Cir. 1993) (upholding zoning ordinance that allowed churches to operate day-care centers in single-family residential districts, while requiring other operators of day-care centers to obtain special use permits).

Courts so routinely uphold RLUIPA and similar laws because they satisfy all three elements of the *Lemon* test. First, RLUIPA has a secular government purpose, namely, “to protect the free exercise of religion from unnecessary government interference.” 146 CONG. REC. E1234, E1235 (daily ed. July 14, 2000) (statement of Rep. Canady); *Mayweathers*, 314 F.3d at 1068. As the Supreme Court has repeatedly made clear, it is a “proper [government] purpose [to] lift[] a regulation that burdens the exercise of religion.” *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 338 (1987); *id.* at 339 (noting the “permissible purpose of limiting governmental interference with the exercise of religion”). Indeed, not only is it permissible for government to accommodate religious exercise, it is commendable and sometimes mandatory.<sup>80</sup>

Legislative accommodations of religion are all the more common – and necessary – since the Supreme Court’s decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), made clear that people of faith should generally turn to the legislative and executive branches, not the courts, for protection of their religious liberty:

Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process. Just as a society that believes in the negative protection accorded to the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also a society that believes in

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<sup>80</sup> *Amos*, 483 U.S. at 334 (“This Court has long recognized that the government may (and sometimes must) accommodate religious practice and that it may do so without violating the Establishment Clause.”); *see id.* at 338 (noting “the teaching of our cases that there is ample room for accommodation of religion under the Establishment Clause.”); *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) (noting that the Constitution “affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any.... Anything less would require the ‘callous indifference’ we have said was never intended by the Establishment Clause.”); *Zorach v. Clauson*, 343 U.S. 306, 314 (1952) (accommodating religious exercise “follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs.”).

the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well.

*Smith*, 494 U.S. at 890. In short, the government may – and should – accommodate private religious practice by legislation.

For example, while the Court in *Smith* rejected the claim that the Free Exercise Clause mandated an exemption to drug laws, religious peyote use accommodations have been made at both the federal and state levels. These are constitutional, even though others wishing to use peyote for secular reasons are not offered the exemption.<sup>81</sup> Similarly, after the Supreme Court ruled that an Air Force psychotherapist had no right under the Free Exercise Clause to wear a yarmulke while on duty in *Goldman v. Weinberger*, 475 U.S. 503 (1986), Congress responded by statutorily enacting such a right in the National Defense Authorization Act for Fiscal Years 1988 and 1989, 10 U.S.C. § 774, a permissible accommodation of the religious liberty of service members.<sup>82</sup>

Although Defendants nonetheless complain that RLUIPA’s purpose is impermissible because it singles out religion for special favor, *see* Defs. Mem. 40, 41, the Supreme Court has already rejected this argument: “Where ... government acts with the proper purpose of lifting a

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<sup>81</sup> *See Lee v. Weisman*, 505 U.S. 577, 628-29 (1992) (Souter, J., concurring) (“[I]n freeing the Native American Church from federal laws forbidding peyote use, *see* Drug Enforcement Administration Miscellaneous Exemptions, 21 C.F.R. § 1307.31 (1991), the government conveys no endorsement of peyote rituals, the Church, or religion as such; it simply respects the centrality of peyote to the lives of certain Americans.”); *Smith*, 494 U.S. at 890 (“[A] number of States have made an exception to their drug laws for sacramental peyote use.”).

<sup>82</sup> *See Texas Monthly v. Bullock*, 489 U.S. 1, 18 (1989) (plurality opinion of Brennan, Marshall, and Stevens) (“[I]f the Air Force provided a sufficiently broad exemption from its dress requirements for servicemen whose religious faiths commanded them to wear certain headgear or other attire, *see Goldman v. Weinberger*, ... that exemption would not be invalid under the Establishment Clause even though this Court has not found it to be required by the Free Exercise Clause.”) (citation omitted).

regulation that burdens the exercise of religion, we see no reason to require that the exemption comes packaged with benefits to secular entities.” *Amos*, 483 U.S. at 338.

RLUIPA also satisfies the second *Lemon* factor, because alleviating burdens on religious exercise – here, in houses of worship and similar land uses – does not have the effect of advancing religion. It merely reduces intrusion and oversight by the government as to how religious individuals and institutions carry out their missions. While this may enable those entities to advance their religious purposes, the Supreme Court has held this to be a permissible effect:

A law is not unconstitutional simply because it allows churches to advance religion, which is their very purpose. For a law to have forbidden “effects” under *Lemon*, it must be fair to say that the government itself has advanced religion through its own activities and influence. As the Court observed in *Walz*, “for the men who wrote the Religion Clauses of the First Amendment the ‘establishment’ of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity.”

*Amos*, 483 U.S. at 337 (quoting *Walz v. Tax Comm’r*, 397 U.S. 664, 668 (1970)).

Third and finally, RLUIPA does not foster an excessive government entanglement with religion. Defendants complain that RLUIPA forces entanglement, because religious accommodation requires “becoming expert in the needs and requirements of the religious landowners in the community.” Defs. Mem. 41. But this argument proves too much, for then government could never take account of religious belief for the purpose of accommodation. *See Johnson v. Martin*, 223 F. Supp. 2d 820, 826-27 (W.D. Mich. 2002); *Charles v. Verhagen*, 220 F. Supp. 2d 955, 967 (W.D. Wis. 2002). This would contradict not only common sense, but the Supreme Court’s emphasis that “[t]here is ample room under the Establishment Clause for ‘benevolent neutrality which will permit religious exercise to exist without sponsorship and

without interference.’’ *Amos*, 483 U.S. at 334. Indeed, the purpose and effect of RLUIPA is precisely to *minimize* the entanglement of government officials in religious exercise; RLUIPA’s deregulation of religion is the exact *opposite* of entanglement. As in *Amos*, “[i]t cannot be seriously contended that [the statutory accommodation of religious exercise] impermissibly entangles church and state; the statute effectuates a more complete separation of the two and avoids the kind of intrusive inquiry into religious belief” that the Constitution prohibits. *Id.* at 339.

Because RLUIPA satisfies all three elements of the *Lemon* test, it cannot reasonably be viewed as an endorsement of religion. *Mitchell v. Helms*, 530 U.S. 793, 835 (2000) (citing *Agostini v. Felton*, 521 U.S. 203, 235 (1997)); *see* Defs. Mem. 42. For all these reasons, the Township’s Establishment Clause challenge to RLUIPA should be rejected.

#### **IV. DEFENDANT MATTEO SHOULD NOT BE DISMISSED FROM THIS ACTION.**

Defendants argue that Larry Matteo should be dismissed from this action because he may be entitled to qualified immunity. But qualified immunity only applies to defendants sued in their individual capacities. *W.B. v. Matula*, 67 F.3d 484, 499 (3d. Cir 1995) (citing *Brandon v. Holt*, 469 U.S. 464, 472-73 (1985)). Mr. Matteo is sued in his official capacity. Therefore, he is not liable for damages, he does not need qualified immunity, and is not entitled to qualified immunity. But to the extent that he – as Director of Code Enforcement of Abington Township – is responsible for enforcing the Township’s laws against the Congregation, he is subject to equitable relief enjoining such illegal behavior. *See Anderson v. Davila*, 125 F.3d 148, 161 (3d

Cir. 1997) (holding that doctrine of qualified immunity is inapplicable to injunctive relief).

Accordingly, Mr. Matteo should not be dismissed as an official-capacity defendant.<sup>83</sup>

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83 Finally, Plaintiffs agree that if this Court were to dismiss all other constitutional and statutory claims over which it has original jurisdiction, the Court should decline to exercise supplemental jurisdiction over the claim pursuant to the Pennsylvania Municipalities Planning Code and dismiss that Count without prejudice. *See* Defs. Mem. at 66-67; 28 U.S.C. § 1367(c)(3); *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966). If, however, the Court would address this claim on the merits, the Court should find a genuine issue of material fact regarding whether the ZHB abused its discretion in prohibiting the Congregation's synagogue use, based on the evidence set forth in Sections E. and H. of the Factual Statement, *supra*. *See, e.g., Four Three Oh, Inc. v. BAPS Northeast, Inc.*, 256 F.3d 107 (3d Cir. 2001) (finding zoning decision "arbitrary and capricious" under New Jersey law).

**CONCLUSION**

For the foregoing reasons, Defendants' Motion for Summary Judgment should be denied.

Dated: March 14, 2003

Respectfully submitted,

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